THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, MAY 14, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

ERRATA.—The article on the Relative Importance of Case Law in our last number (p. 301) should have been credited to the Canada Law Journal. In the note to Bessig v. Britton, "Cripps v. Hartwell," quoted from 4 B. & S. 414, should read "Cripps v. Hartnoll." It is necessary to make this correction, because this case overrules the case of the same name cited in Judge Wagner's opinion from 2 B. & S. 697.

CONFINEMENT OF INSANE MURDERERS.—To our industrious and accurate correspondent at Detroit, Mr. Chaney, we are indebted for an opinion of that able criminal jurist, Mr. Justice Campbell, pronounced in the Supreme Court of Michigan, in the case of Underwood v. The People, which we elsewhere print, and which relates to the interesting question of the power of the state to confine insane criminals, and the mode in which such power may be exercised. It will be seen that the learned judge holds that a statute which in effect commits the confinement of such persons to the discretion of inspectors of an insane asylum is unconstitutional, because it deprives the citizen of his liberty without due process of law. The scope of the opinion can not, however, be judged of without a careful reading of it.

RIGHT TO KEEP AND BEAR ARMS FOR PUBLIC AND PRIVATE DEFENCE.—We have heretofore (1 CENT. L. J. 259, 272, 285, 295), exhibited the state of the decisions under those provisions of the various state constitutions which guarantee the right to keep and bear arms for the public and private defence, and also under that provision of the national constitution which declares that "the right of the people to keep and bear arms shall not be infringed." The question has recently been before the Supreme Court of Pennsylvania (for the first time, we believe), but, instead of receiving the consideration which its importance deserved, was dismissed in a brief *per curiam* opinion, in the following words:

> This indictment is for the offence of unlawfully and maliciously carrying upon the person of the defendant *a concealed deadly weapon*, to-wit, a pistol, with an *intent* unlawfully and maliciously *to do bodily harm* to another, contrary to the act of 5th of May, 1804, 3 1, 1 Brightly, 323, pl. 40. Such an unlawful act and malicious intent as this has no protection under the 21st section of the bill of rights, saving the right of the citizens to bear arms in defence of themselves and the state.

SAINT LOUIS BAR ASSOCIATION.—The adjourned meeting of this association was held on Saturday last, at 3 o'clock. The recommendation of the judiciary committee, that the constitution be so changed as to dispense with the general term of the St. Louis Circuit Court, was taken up for consideration.—A substitute was offered providing for an increase of the number of judges of the circuit court to eight; making, three of them an appellate court to sit all the time, while the remaining five should hold special terms, and making the appellate jurisdiction final as to cases originating in this county, except causes involving constitutional questions, and those involving questions arising under the statutes and treaties of the United States, cases involving the construction of the revenue laws, and cases where a county or some state officer is a party. The substitute was ordered to be printed, and the consideration of it was postponed until the next meeting.—Judge Lewis offered an amendment providing that the answer of defendant in a civil cause may be a general denial. Referred to committee on amendment of the laws.—T. A. Russell, Esq., offered an amendment as to service on corporations having an office and doing business in this city, or on railroad companies whose roads terminate opposite this city. Referred to same committee.—Adjourned to next Saturday, May 15th, at 3 o'clock, P. M.

THE "GAG-LAW" CASE.—After considerable delay, we this week publish the very important decision of Judge Dillon in the case of Buell, who was arrested in Missouri, under an indictment for libel in the Criminal Court of the District of Columbia, and whose removal was sought in pursuance of the federal statute applicable to such cases. Mr. District Judge Treat having refused to issue a warrant for his removal, the case was appealed to the circuit court, where the decision, which we now publish (affirming the district court), was rendered by Judge Dillon.

It will be seen that it was not controverted that Mr. Buell might have been removed to the District of Columbia for trial, if the indictment had, with adequate certainty, charged an offence against the laws of the United States, committed within that district. The important question in the case was, then, a jurisdictional one, namely: whether upon such an application, the district judge can pass upon the sufficiency of the indictment, or whether that duty must be remitted to the court in which the indictment was returned; and the decision is that the district judge can and should pass upon the sufficiency of the indictment.

As to the remaining question, the indictment in this particular case was ruled insufficient, because it, in substance, averred that the libel was written in the District of Columbia, and printed in the Detroit Free Press, in the state of Michigan, and did not, with sufficient certainty, allege a *substantive publication in the District of Columbia*; the words of the indictment, "did *then and there* * * publish," etc., being held insufficient to import a publication within the District of Columbia. The court states, in substance, that in such a case the indictment should not be held insufficient for technical defects; but that any judge who should fail to apply, on such an application, liberal and enlightened principles, "would misconceive his duty and fail to protect the rights of the citizen."

THE MISSOURI CONSTITUTIONAL CONVENTION.—This body assembled at Jefferson City on the 5th instant, and has consumed most of its time, to the day of our going to press, in the work of preliminary organization. Altogether it assembles under very unfavorable auspices. In the first place, its right to sit at all, is by many seriously doubted and questioned. The returns of the election in which the question of holding a convention was voted on, were very slow

in coming in, and when they were all in, a majority of 221 votes only, was exhibited in favor of a convention, and this has been asserted with some probability to have been a counted, and not a voted, majority. Under these circumstances, the motion made in the convention by Mr. Gottschalk of St. Louis, which was in effect that the convention should proceed to investigete its right to exist before entering upon its main work, was eminently proper, though of course futile; for where could sixty-eight statesmen be found who would willingly put aside so much glory?

In the second place the members of this convention have gone up to the capitol supported by a very feeble array of votes. The fact that in the election for delegates there was such a general apathy, added to the fact that the voters of the state were very nearly equally divided on the question of having a convention at all, clearly indicates the lack of any considerable popular feeling in favor of the necessity of amending the organic law.

A third and still more unfavorable omen consists in the fact that the calling of this convention has been exclusively a *party* movement. The votes in pursuant of which it exists were exclusively the votes of *one* political party. And what is much worse, nearly all its members are identified with that party. Unfavorable inferences have also been drawn, from the fact that the gentleman elected president of the convention was strongly identified with the cause of the late Confederacy, having been expelled from the United States senate for disloyalty in 1861, and having subsequently served in the confederate Congress as a senator from Missouri. We do not, however, attach much significance to this fact, and are unwilling to believe that it argues on the part of a body of this character, a disposition to perpetuate the lines drawn by the late war.

But altogether this convention has much reason, if not to question its own right to exist, at least to proceed with humble diligence to its task, and to make haste slowly in the important work of changing our organic law.

Parliamentary Lawyers—How to Break up Lobbies.

The Nation, after commenting on the decision of the Supreme Court of the United States, in Burke v. Child (2 Wash. Law Reporter, 113), in which it was held that a contract to pay for lobby services in getting a private bill through Congress, was against public policy and void, recommends the establishment of a parliamentary bar similar to that in England. The leading features of procedure under the English system, it describes as follows:

First. All applications for private bills must be filed and advertised before the beginning of the session.

Second. A sworn committee of each house then makes up impartial committees, and assigns the applications to them.

Third. The members of these committees are bound to declare any bias or interest either of themselves or of their constituents, if it be a local measure.

Fourth. Any person interested either for or against a bill, may challenge a member of a committee as he would a juror.

Fifth. The committees sit with open doors and try the case, keeping and reporting to the house an exact record of their proceedings. Finally, when they report for or against the bill, it goes upon a calendar, and is as certain to be reached and acted upon in its order as a lawsuit upon the trial docket of a court of justice.

This system is in noble and dignified contrast with the system which prevails in our national Congress, and in our state legislatures. Private suitors, appealing to the British parliament for any species of relief, must proceed in an open and formal manner, similar to a proceeding in a court of justice. They must make out their case by a proceeding in open committee, similar to a proceeding in open court. But with us, such suitors resort to every species of intrigue, to the private button-holing of members, to the giving of sumptuous dinners, to open bribery, and even to threats, to carry through their measures. It is a deep, national disgrace that we, who have advanced in so many elements of civilization, have stood still, or even retrogaded in this important particular.

It is obvious, however, that the creation of a parliamentary bar will not of itself remedy the evil complained of. The main remedy must be sought in the exertion upon legislative bodies of an enlightened public sentiment, which may in course of time discipline them to a code of honor, similar to that which obtains in the legal profession and governs judicial proceedings. But it can not be doubted that a parliamentary bar would be a great auxiliary to this sentiment, and that under its influence a system of legislative ethics might gradually grow up, making it dishonorable for any member to suffer himself to be approached *privately*, with reference to measures which may come before the body of which he is a member. That the existence of the bar is a great restraint against corruption on the part of judges, cannot be questioned; that a parliamentary bar would exert a like wholesome influence over legislative bodies, would be a reasonable expectation.

Curiosities of the Law Reporters.

"The court of chancery, while Lord Eldon held the seals, appeared to many a despairing suitor no other than John Bunyan's renowned Doubting Castle itself." Goldsmith Eq., p. 53.

In Wharton's case, Yelv. 24, which was an indictment for murder, the jury returned a verdict of not guilty. "Wherefore Popham, Gawdy and Fenner *fuerunt valde irati*, and all the jurors were committed and fined, and bound to their good behavior," etc.

Dr. Phebbeare has a grave argument against policies of insurance, on the ground that they lessen "dependence in the mind of man on the Supreme Being." Letters on the English Nation, by B. Angeloni, Vol. 1, p. 101, 8vo, 1755, quoted in Buckle's Miscellaneous Writings, pl. 2249.

The following is one of the head-notes to a case reported in the second volume of Paige's Chancery Reports, p. 438: "A receiver can not be appointed to deprive the defendant of the possession of his property, *ex parte*, without giving him an opportunity to be heard in relation to his rights, except in very special cases, as where he is out of the jurisdiction of the court."

In the case of The King v. The Warden of the Fleet, 12 Mod. 340, it was objected to a witness that he had been convicted of common barretry, and a record of his conviction was produced, which showed that he had been fined £100. Holt, C. J., said: "If he had had the handling of him he had not escaped the pillory, and that he remembered Sergeant Maynard used to say it were better for the country to be rid of one barreter than of twenty highwaymen."

In a very recent case in Louisiana, Mr. Justice Howe uses the following language in delivering the judgment: "We need in criminal matters the 'justice, mercy and truth' of the common law, and not its 'mint, anise and cummin.' There is no more need that the state of Louisiana should make vain repetitions in her pleadings than there is that her Christians should make them in their prayers." The State v. Phelps, 24 La. Ann. 492 (1872).

An action for words touching the murder of the defendant's husband; the defendant moved the court for an imparlance, because the plaintiff was indicted for the murder in the admiralty court, the fact being committed upon the high seas, and alleged that if this cause be tried in this court, the strength of the king's evidence would be discovered, and that this action was only an artifice of the plaintiff's to discover what evidence the prosecutrix had against him. On great debate, the court granted an imparlance till next term. Gibson v. Niven, Cooke, 211, 3rd ed.; Prac. Reg. 225; Barnes, 224.

Mr. Justice Coleridge, in the maintenance of the principle that even to the representatives of the people, the house of commons, the most powerful body in the nation, the calumny of its individuals is forbidden, said: "I soberly ask the warmest advocate of this extended privilege, whether any benefit in a land, all the institutions of which seek the genial sunshine of public opinion, and must languish without it, can make up for the injury resulting from this, that it should be capable of being said with truth, the house of commons *has become a trader in books, and claims as privilege a legal monopoly in slander.*" Judgment in Stockdale v. Hansard, 2 Per. & Dav. 218; 9 Ad. & El. 243.

To the case of Moore v. Moore, 2 Atk. 273, which arose upon some differences and disputes between husband and wife, the reporter appended the famous "Nota Bene: 'Mr. Attorney-General [Sir Dudley Ryder] after the decree was pronounced, said, this was so uncommon a case that probably it would never happen again. The lord chancellor [Lord Hardwicke] replied: If you think so, you must have a very good opinion of the ladies, for

> In amore hæc omnia insunt vitia: injuriæ,
> Suspiciones, inimicitiæ, induciæ,
> Bellum, pax rursum."—Terence, Eunuchus, act I, scene I, near the commencement.

With the restoration came a new licensing act, which vested the entire control of printing in the government, and provided a censorship which was intrusted by Clarendon to the hands of Sir Roger L'Estrange, a Tory pamphleteer and most scurrilous libeller. Periodical sheets made up of political dissertations, now became quite numerous; but the embargo upon news was maintained with a rigor which may be estimated from Chief Justice Scroggs's charge to a jury, at a time when the licensing act had temporarily expired, not only that "all writers of false news, though not scandalous or seditious, are indictable on that account," but that "to print or publish any news-books or pamphlets of news whatsoever, is illegal," and that "it is a manifest intent to the breach of the peace." The North American Review, Vol. CXIV, pp. 45, 46.

The following is an extract from a case decided by the Supreme Judicial Court of Massachusetts. The facts are sufficiently stated in the judgment, which was delivered by Mr. Justice Cushing:

"Eliakim Willis was pastor of the parish of Malden; a batchelor or a widower without children; a devout old man of the state of theological opinion prevailing at the close of the last century, when Puritanism, though ceasing to be exclusive, was not the less earnest and sincere. He was from New Bedford, where he had a brother, Ebenezer Willis, still living; and he retained there, as a reminiscence of his youth, the old family pew in the North Meeting House. By prudence and care he had economized, out of his modest salary as a country clergyman, a decent estate, consisting chiefly of land. His brothers, Ebenezer and Jireh, were, it may be presumed, reasonably well off; for he bequeathed to them by his will some personal objects only, as tokens of remembrance and affection. He had a widowed sister, Mercy Marchant, for whose comfortable support through life he provided. He remembered the church in which he had so long ministered, and gave to it his favorite copy of the Bible, to be read in public on every Lord's day.

"He then looked around for some object of general philanthropy worthy of his regard. He doubted, but, on the whole, came to a wise conclusion, and resolved to make a donation to the Society for the Propagation of the Gospel among the Indians, who, he might have reflected, had not been over-well treated either by England or by the colonies in New England. As to family connections, he had a favorite niece, who had passed through her romance of youth, had married and been left by her deceased husband a widow, with two children, but without property, and had been invited by her good uncle to look to him for support, and probably been taken into his family. Among the parishioners of Mr. Willis, was a substantial and worthy gentleman himself a widower, apparently with a child or children. A very natural event followed. Colonel Popkin married the still comely widow, and a third family grew up under the eyes, and enjoying the affection of Mr. Willis. Such was the condition of the family when the will was made.

"Mr. Willis looked considerately after his own affairs, but consulted Colonel Popkin, and was tenderly cared for by his niece, Mrs. Popkin. They were his children in affection. Accordingly, in making general disposition of his property, he divided the bulk of it equally between the fruits, respectively, of first and second marriages of his neice, providing, however, that she should have the improvement of the whole estate during her natural life. But here, doubts as to the wal came into his mind. The spectre of the celebrated rule in Shelley's case, rose before him. Perhaps—for it happened during his life—he had read or heard of the tribulation and perplexities of the Earl of Mansfield, in the case of Perrin v. Blake. And accordingly, after making the devise to the two sets of his nieces' children, with reservation of a life-estate in his niece, he added the following words: "If it is not contrary to the laws of this commonwealth—the preceeding article notwithstanding—if it is contrary, this item I hereby make null and void, so as in no way to affect the other items, of this, my last will." In this way, his niece and her children were amply considered, and the whole office of gratitude and love to them, and each of them respectively, was faithfully per-

formed, so far as the law would allow it to be done." Popkin v. Sargent, 10 Cush. 332, 333.

In the case of James v. The Commonwealth, 12 S. & R. 220, it was decided that the ducking-stool is not the punishment of a common scold in Pennsylvania. Mr. Justice Duncan delivered a very lengthy and amusing opinion, in which he exhausted the entire learning on the subject. We present two short extracts, but the whole opinion is well worthy of perusal. "Now, I ask," he says, "with as much gravity as I can command, if Mrs. Thrale, the widow of the great brewer Thrale, the rich, learned, accomplished, and fashionable Mrs. Thrale, had not put sufficient malt in her liquor, if she should be exposed to the punishment of the cucking-stool, and be ducked in stinking water; or if the celebrated Dr. Johnson, the leviathan of learning, the executor of Mr. Thrale's will, had broken the assize, if the pillory would have been his punishment? for I think we are informed by Mr. Boswell, that he saw him in the brewery, attending to its concerns, and bustling about, with his ink-horn tied to the button of his coat; or would he be ducked in stercore, for Jacobs, in his dictionary, informs us, the trebucket was a punishment for brewers and bakers, who were ducked in stercore, or in stinking water; and we must never forget, that the law professes equality of punishment; that the common law, which stamps freedom and equality upon all who are subject to it, which protects and punishes with an equal hand the high and the low, the proud and the humble, I say professes, for in the trebucket punishment we shall presently see, that it was never intended for the rich, and never was inflicted on beauty and youth."

At p. 230. "I am far from professing the same reverence for all the degrading and ludicrous punishments of the early days of the common law. I am far from thinking that this is an unbroken pillar of the common law, or that to remove this rubbish would impair a structure which no man can admire more than I do. But I confess I am not so idolatrous a worshipper as to tie myself to the tail of this dung-cart of the common law."

F. F. HEARD.

NATICK, MASS.

The "Poland Gag Law"—Removal of Offenders to the District of Columbia for Trial.

IN RE AUGUSTUS C. BUELL.

United States Circuit Court, Eastern District of Missouri, March Term, 1875.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. **Libels in District of Columbia.**—For a libel composed and published in the District of Columbia, the author and publisher may be there indicted and punished as for an offence against the United States.

2. **Fugitives from Justice—Crimes Committed in District of Columbia.**—Under § 014 of the revised statutes of the United States, "for any crime or offence against the United States," committed in the District of Columbia, the offender may be arrested in any of the states, and removed to the District of Columbia for trial.

3. ——. **Judge may Look into Indictment.**—In such a case the district judge before whom the application for the removal of the alleged offender is made, may properly look into the indictment against him, and if it fail to disclose, by necessary averments, an offence against the laws of the United States triable in the District of Columbia, it is his duty to refuse to issue the warrant for his removal.

4. ——. ——. **Case in Judgment.**—Thus, an indictment which charges that certain libellous matter was composed and written in the form of a newspaper article in the District of Columbia, and printed in a newspaper called and known as the Detroit Free Press, printed in the city of Detroit, and state of Michigan, which said scandalous libel the defendant "did then and there unlawfully publish," charges an offence against the laws of Michigan, but not an offence against the laws of the United States, committed in the District of Columbia, and a warrant will not be issued for the removal of the person thus charged, from the state of Missouri to the District of Columbia for trial. The indictment is fatally defective in that it fails to charge by distinct averments a *publication within the District of Columbia.*

This is an appeal by the United States from an order made by the Hon. Samuel Treat, Judge of the District Court of the United States for the Eastern District of Missouri, on the 9th day of March, 1875, in a proceeding by *habeas corpus*, discharging Augustus C. Buell from the custody of the marshal for said district, and refusing on the motion of the district attorney, to issue a warrant for the removal of the said Buell for trial to the District of Columbia.

The material facts are these: Buell was indicted on the 2d day of July, 1874, in the Supreme Court of the District of Columbia, for criminal libel on one Zachariah Chandler.

The indictment charges that Buell "on the 19th day of February, 1874, in the county of Washington and District of Columbia, of his malice, etc., did compose and write a certain false, libel of and concerning the said Zachariah Chandler, in the form of a newspaper article, printed in a newspaper called and known as the Detroit Free Press, printed in the city of Detroit and state of Michigan, as follows" [here setting out the libellous matter in "said newspaper article printed as aforesaid"] "which said scandalous, etc., libel, he, the said Augustus C. Buell, afterwards, to-wit: on the day and year aforesaid, and in the county and district aforesaid, did then and there unlawfully, etc., publish and cause to be published, to the great damage, etc., contrary to the form of the statute," etc., etc.

Buell being found in the eastern district of Missouri, Wm. Patrick, Esq, the United States attorney for the said district, filed an official information, *not under oath*, before Enos Clarke, Esq., a commissioner of the United States for the said district, charging Buell with the above offence, and accompanying the information with an exemplified copy of the indictment; and on March 4, 1875, the commissioner, after a hearing (Buell not having found bail), issued his warrant committing Buell to the "custody of the marshal, to await the action of the judge of the United States District Court for the Eastern District of Missouri, on his receiving information of said Buell's commitment, that he may be removed from said eastern district of Missouri to said District of Columbia for trial, pursuant to law." Buell sued out a writ of *habeas corpus* from the said district judge, which was served upon the marshal, who made return that he held the prisoner by virtue of the said warrant, which, with a copy of the indictment is made a part of his return. Upon hearing the petition for *habeas corpus*, the district judge made an order discharging Buell from the custody of the marshal, and refusing to order his transfer to the District of Columbia for trial. The district attorney prayed an appeal to the circuit court (Rev. Stats. sec. 763), which was allowed; and the matter was, after argument, submitted to the court, March 23, 1875. The jurisdiction of the circuit court of the appeal was conceded by counsel.

William Patrick, United States District Attorney, for the United States; *James O. Broadhead*, for Buell.

DILLON, Circuit Judge:—In the argument before me the counsel for Mr. Buell has not maintained that the matter charged in the indictment to have been composed and published by him concerning Mr. Chandler is not in its nature libellous, and there is no doubt that it is so. Nor has the counsel for Mr. Buell controverted the position that for a libel *composed and published* in the District of Columbia, the offender may be *there* be indicted and punished as for an offence against the laws of the United States. And of this opinion was the learned judge of the district court—that opinion resting upon the act of Congress of February 27, 1801 (2 Stats. at Large, 103), adopting and continuing in force within the District of Columbia the laws of Maryland; the act of February 25, 1865 (13 Stats. at Large, 439), recognizing libel as an indictable offence against the

United States, in the District of Columbia, and the decisions of the Supreme Court of the United States concerning the effect of the above mentioned act of February 27, 1801. Rhodes v. Bell, 2 How. 397; United States v. Simms, 1 Cranch, 258; Stelle v. Carroll, 12 Peters, 205; Kendall v. United States, 12 Peters, 524; *ex parte* Watkins, 7 Peters, 575.

By the act of 1801, says Chief Justice Taney, "the common law in civil and *criminal* cases, as it existed in Maryland at the date of this act of Congress (February 27, 1801), became the law of the District of Columbia, on the Maryland side of the Potomac." The Virginia portion was retroceded in 1846. 9 Statutes at Large, 33.

It will therefore be assumed that the offence of libel in the District of Columbia is an offence against the United States, for which the offender may be there indicted as at common law and punished.

This being so, and Mr. Buell having been there indicted for such an offence, our enquiry is, whether there is any law authorizing the removal of persons found beyond the District of Columbia to to that district for trial, for offences committed therein. In this respect there is no difference between libel and other offences, and the question is a general one, whether for *any* offence committed in the District of Columbia, against the laws of the United States, the offender found elsewhere can be removed there for trial. On this point, under the law as it stands, I have no doubt. The authority is ample and the language of the revised statutes (sec. 1,014) in connection with the act of June 22, 1874, removes the doubts arising on the words "such court of the United States as by *this act* (the judiciary act of 1789), has cognizance of the offence."

The District of Columbia is not a sanctuary to which persons committing offences against the United States may fly and be beyond the reach of justice, nor is the law so defective that persons there committing such offences and escaping or found elsewhere, can not be taken back there for trial. I agree to the views in general of the district judge on this point, as expressed in his opinion, which accompanied the record in the case, and do not think it necessary to enlarge upon it.

The statute provides that United States commissioners and certain magistrates "for any crime or offence against the United States," may "arrest and imprison, or bail the offender for trial before such court of the United States as by law has cognizance of the offence." Rev. Stats. sec. 1,014. An information was filed before Commissioner Clarke, who committed the prisoner to the custody of the marshal. In such a case the further provision is that "where any offender is committed in any district, other than that where the offence is to be tried, it shall be the *duty of the judge of the district* where such offender is imprisoned, seasonably *to issue*, and the marshal to execute *a warrant for his removal to the district where the trial is to be had.*" Rev. Stats. sec. 1,014. On the proceedings before him the district judge refused to issue the warrant of removal and discharged the prisoner; and the question is whether his action in this case ought to be reversed.

The district judge, in making this order, proceeded upon the ground that he might properly look into the indictment, and if it was fatally defective in essential averments to constitute an offence triable in the District of Columbia, he might refuse to issue the warrant for the prisoner's removal. It is argued that the question of the sufficiency of the indictment is for the court in which it was found, and not for the district judge on such an application. *Re* Clarke, 2 Benedict, 540. I can not agree to this proposition in the breadth claimed for it in the present case. This provision devolves on a high judicial officer of the government, a useful and important duty. In a country of such vast extent as ours it is no light matter to arrest a supposed offender, and on the mere order of an inferior magistrate remove him hundreds, it may be thousands of miles, for trial. The law wisely requires the previous sanction of the district judge to such a removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offence against the laws of the United States, or showed an offence not committed or triable in the district to which the removal is sought, would misconceive his duty and fail to protect the liberty of the citizen. It is the constitutional right of the citizen to be tried in the district in which the offence imputed to him is alleged to have been committed, and not elsewhere. Article 2, section 2.

In this case the district judge discharged the prisoner, on the ground that the indictment failed to show that the alleged libel was published in the District of Columbia, but showed rather that the offence charged therein was an offence, if at all, against the laws of Michigan. If this is a proper view of the indictment, his action was unquestionably proper. The language of the indictment is peculiar. It was only necessary for the pleader to have averred that the defendant did not compose and publish the libellous matter, setting it out, within the District of Columbia. Such are the precedents. Why is it alleged out of the ordinary course, that the libel was composed and written in the form of a newspaper article, and printed in the Detroit Free Press, in the state of Michigan, and afterwards, to wit, on the day and year aforesaid, published in the District of Columbia?

The district attorney, notwitstanding some old English cases, very properly admitted that *publication* by the defendant in the District of Columbia was essential to the offence, and that if this libel was published in Michigan, by the procurement of the defendant, he could be there indicted for it. But he contended that if the paper containing the libellous article was afterwards *published* (in the legal sense) by the defendant in the District of Columbia, he could also be there indicted for it as an offence against the United States, and he claimed that in this aspect of the question, the indictment was sufficient to charge such an offence. Whatever may be the correctness of the contention of counsel in these respects, it seems to me quite doubtful whether the indictment intended to charge a substantive publication by the defendant in the District of Columbia, or any publication in that district, except so far as composing a libel there for publication in a newspaper elsewhere, is in law a publication in the district. This without more would not be a publication in the district. Upon the authorities it seems clear that if the defendant composed a libel in the District of Columbia, with intent to have it published in a newspaper in Michigan, and it was there published by the defendant's procurement or consent, he would be liable to indictment in the latter state. 1 Russell on Crimes, 258 and cases cited; 3 Chitty Cr. Law, 872; Rex v. Johnson, 7 East, 68; Commonwealth v. Blanding 3 Pick. 304. But the indictment would then be for an offence against the laws of the state of Michigan, and not of the United States. Therefore the present indictment states facts which show a violation of the laws of Michigan. But is contended that it also shows an offence against the laws of the United States in the District of Columbia. Merely composing the libel in the district would not be sufficient, as the whole *corpus delicti* which includes publication in the district, is essential. If it had been intended to charge that the defendant not only wrote the libel in the District of Columbia, but after its publication in the Detroit Free Press he had also published it in the District of Columbia, in any manner which in law constitutes a publication, the pleader should either have followed the precedents and omitted all reference to the publication in Michigan, or if he alleged such publication, he should have made a positive and plain allegation of a substantive and distinct publication by the defendant of the libel, in the District of Columbia.

As above remarked, the most natural construction of the indictment, is that it is framed upon the erroneous legal notion that if a

libel is composed within the District of Columbia for publication elsewhere, and it is accordingly published, this, *without more*, is a publication in the district, and makes the offence complete. But suppose that it can be deduced that the pleader intended to charge a distinct, substantive publication of the libel by the defendant, in the District of Columbia, it can hardly be expected that the well-known requirements of *certainty* in the allegations of an indictment can be disregarded, and that the court will supply by inference and argument the defects or omissions in the indictment. The most essential ingredient of libel is the *publication*; and the all-essential element of the offence charged in the present indictment is the publication *by the defendant within the District of Columbia*. The uncertainty of the indictment in the latter respect is sufficient to vitiate it. As the grand jury have not plainly said that the defendant published the article in the District of Columbia, in addition to the publication in Michigan, the court can not intend that they meant to say it. It is a fundamental doctrine in English and American law, that there can be no constructive offences; that before a man can be punished, his case must be clearly within the law; the charge is to be unmistakably set forth in the indictment, and if there be uncertainty or fair doubt, whether the law embraces the act, or the indictment sufficiently charges the offence, the doubt is to be resolved in favor of the accused. United States v. Morris, 14 Pet. 464. United States v. Wiltberger, 5 Wheat. 76.

I have no hesitation in applying these liberal and just principles to the present case, because if libel in the District of Columbia be an indictable offence against the United States, it is an exception, curiously brought about, to the general rule that there are no common law offences against the general government, and because the defect in the present indictment is not merely formal or technical, but goes to the gist of the offence for which the prisoner is sought to be removed.

The provision (Rev. Stats., Sec. 731) that when any offence is commenced in one district and terminated in another, the trial may be had in either, and the offence may be deemed to have been committed in both, although urged by the district attorney, has, in my judgment, no application to this case. The argument is, that if the defendant composed the libel in Washington, and sent it to Michigan for publication, and it was there published, he may be tried in either place in the courts of the United States. Such an extension of the law of libel can hardly be said to have the sanction of the English courts, where prosecutions for libel have been carried very far, and it can not be very seriously expected that a court in this country will assert any such alarming and dangerous doctrine.

Not to mention other fatal objections to the argument, it is sufficient to advert to the fact that, in the case supposed, there is no law in the state of Michigan where the offence is said to have been "terminated," making libel an offence against the United States. The order of the district court is affirmed and the prisoner discharged. ORDERED ACCORDINGLY.

Mode of Criminal Prosecutions in the Federal Court.

UNITED STATES v. WILLIAM R. MAXWELL.

United States Circuit Court, Western District of Missouri, April Term, 1875.

Before Hon. JOHN F. DILLON, Circuit Judge, and Hon. ARNOLD KREKEL, District Judge.

Offences "not capital or otherwise infamous" may, by leave of court upon complaint on oath, be prosecuted in the federal courts by criminal information.

An information charging the defendant with several violations of the internal revenue laws was filed by the district attorney by leave of court. Prior to the term, complaint on oath had been made before a United States commissioner, charging the defendant with the said offences against the revenue laws, and the defendant was arrested upon a warrant issued by the commissioner, and held to answer to the United States District Court, and required to give bail in the sum of $500, which he did. At the term, the district attorney, upon the said complaint, warrant and recognizance, moved the court for leave to file criminal information against the defendant, charging him with the said offences, which leave was granted, and the information accordingly filed. The defendant appeared and pleaded guilty. Afterwards his counsel made a motion in arrest of judgment, upon the ground that the defendant can only be prosecuted and punished criminally upon the presentment or indictment of a grand jury, and not upon an information.

It is upon this motion that the case is before the court.

James S. Botsford, District Attorney for the United States; *Mack J. Leaming*, for the defendant.

DILLON, Circuit Judge:—The offence charged in the information is a misdemeanor, and not a "capital or otherwise infamous crime." The defendant was originally arrested by virtue of a warrant issued by a commissioner of the United States, upon a complaint duly made to him under oath showing probable cause. There is, therefore, no ground to claim that the guarantees of personal liberty secured by the fourth amendment to the constitution have been violated, which provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The information was afterwards filed by leave of court, and the defendant after pleading gulity, moved in arrest of judgment. This motion must be sustained if there is no authority of law for the prosecution of such misdemeanors in the federal courts, by criminal information.

The fifth amendment to the federal constitution provides that "no person shall be held to answer for a *capital or otherwise infamous crime*, unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." The offence charged against the defendant is not a "capital or infamous crime." The words "infamous crime," have a fixed and settled meaning. In a legal sense they are descriptive of an offence that subjects a person to infamous punisment, or prevents his being a witness. The fact that an offence may be, or must be, punished by imprisonment in the penitentiary, does not necessarily make it, in law, infamous. 1 Bish. Cr. Law, secs. 70, 644; Rex v. Hickman, 1 Moody, 34; Com'w. v. Shaver, 3 Watts and Serg. 338; Russell on Crimes, 126; 1 Greenl. Ev. secs. 372, 373; People v. Whipple, 8 Cowen, 707; United States v. Shepard, 1 Abb. U. S. Rep. 431, 439.

The constitutional provision, therefore, as to the mode of prosecuting capital and infamous offences has no application to the misdemeanor set forth in the information.

But the question remains, whether other than capital and infamous offences may be prosecuted in any other mode than upon presentment or indictment of a grand jury. In other words, must all federal offences, of whatever character or grade, be prosecuted upon an accusation made by a grand jury?

The constitutional provision above quoted does not say that all offences must be prosecuted with the sanction of a grand jury, but only that certain classes of offences must be. The fair implication is that offences other than those falling within the classes specifically described, may be prosecuted otherwise than through the intervention of a grand jury. And certainly as respects offences not capital and not infamous, there is no restriction upon Congress as to the mode of procedure; and as to such offences it is entirely

competent for Congress to provide that they shall be prosecuted upon indictment or information, or in either mode. But there is no act of Congress prescribing in terms that such offences shall be proceeded against by indictment, or by information, or otherwise. Of course they may be prosecuted by indictment. This is admitted; and it is clear from the fifth constitutional amendment, and from various provisions of acts of Congress in relation to grand juries, etc., that it is contemplated that crimes of all grades may be prosecuted upon the presentment or indictment of a grand jury. But is it contemplated that all offences, although not infamous, must be thus prosecuted? There is no act of Congress to that effect; and no specific declaration of its will, for or against prosecutions by criminal information.

Criminal prosecution for misdemeanors was a familiar mode of procedure in England, "as ancient," says Blackstone (4 Com. 309), "as the common law itself," and was the only existing mode of prosecution, it seems, except by indictment or presentment of a grand jury. Ib. 308. It was a mode in daily and constant use in England at the time of the American revolution, as well as in the American colonies. This was well known when the fifth amendment of the constitution was adopted, which provided only for the previous action of a grand jury in capital or otherwise infamous offences. If it had been intended wholly to prohibit prosecution by information, language expressive of such intention would have been used. Congress has never enactcd a code of criminal procedure, and the states have no power to prescribe either modes of proceedings or rules of evidence in prosecutions for federal offences. In a general way the federal courts must be governed in these respects by the common law, with the modifications pointed out by the supreme court. United States v. Reid, 12 How. 361.

Congress, nevertheless, created federal offences, and clothed the federal courts with jurisdiction over such offences, and no legal reason exists, in the absence of express legislation, why such offences must be prosecuted in only one of the two well known common law methods.

Owing to causes not necessary here to notice (4 Blacks. Com. 309, 310), the proceeding by information was unpopular in England, and doubtless also in the colonies, and it has, in many of the states from a very early day, been either restricted or prohibited. In the law lectures of Joseph Wilson, one of the justices of the Supreme Court of the United States, which were delivered in 1790, he recognizes an information in the name of the state as one mode of prosecuting crimes and offences, and after referring to the two kinds (one strictly public, and the other at the instance of a private person or informer) says: "Restraints have, in England, been imposed upon the last species; but the first—those at the king's own suit, filed by his attorney-general—are still unrestrained." 4 Bl. Com. 307. By the constitution of Pennsylvania, both kinds are effectually removed. By that constitution, however, informations are still suffered to live, but they are bound and gagged. They are confined to official misdemeanors; and even against those they can not be slipt but by leave of the court. By that constitution "no person shall, for any indictable offence, be proceeded against criminally by information, unless by leave of the court, for oppression and misdemeanor in office." 3 Wilson's Works, 144, 145. See also 4 Wend., Bl. Com. 309, note as to bill of rights and decisions in New York; Wharton's Crim. Law (7th Ed.), sec. 213.

Thus, by constitutional provision and positive legislation in the states, informations, as a mode of criminal prosecutions, were either very much restricted or abolished, and the result was that in the state courts the prevailing method of prosecution was by indictment, and naturally the same practice obtained in the federal courts.

But the constitutional provision (fifth amendment) leaves all offences open to prosecution by information, except those which are capital or infamous, and there is no enactment of Congress preventing a resort to this mode of procedure. On the contrary, there are provisions in several acts of Congress which imply that informations may be filed for criminal offences. 1 Stats. at Large, p. 98, sec. 7–32; 2 Stats. at Large, p 290, sec. 3; 3 Stats. at Large, p. 305, sec. 179; 14 Stats. at Large, p. 145, sec. 179.

And it has been several times expressly adjudged that offences not capital or otherwise infamous may be prosecuted in the federal courts by information. United States v. Waller, 1 Sawyer, C. C. 701 (Field & Sawyer, JJ.); United States v. Shephard; Abb. U. S. Rep. 431 (Withey, J.); United States v. Ebert, 1 CENT. LAW J. 205 (Krekel, J). And such seems to have been the opinion of Justice Story. United States v. Mann., 1 Gall. C. C. 3; 1 Ib. 552, 554. And see Walsh v. United States, 3 Wood & M. 341; Bishop Crim. Proc., secs. 604–611; *contra*, United States v. Joe, 4 Chi. Legal News, 105. In The United States v. Isham, 17 Wall. 496; The United States v. Buzzo, 18 Wall. 125, the proceeding by criminal information does not seem to have been questioned in either court. See also Territory of Nebraska, *ex rel.*, etc. v. Lockwood, 3 Wall. 532; Stockwell v. United States, 17 Wall. 236.

We are of the opinion, therefore, that offences not capital or infamous, may, in the discretion of the court, be prosecuted by information. We can not recognize the right of the district attorney to proceed on his own motion, and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury. Where the accusation is a grave one, or where the charge seems to be doubtful, the court will refuse leave to file an information and compel the district attorney to lay it before a grand jury. But it is well known that the internal revenue laws have created a large number of minor offences, many of them involving no moral turpitude, and that the cost of proceeding by a grand jury, and the delay, are burdensome and inconvenient both to the government and the defendant.

In this class of cases, most of which are not defended, great and unnecessary expenses will be saved by proceeding by information, and we not only think the practice legal, but one which, in cases of this kind should, with the restrictions above mentioned, be adopted and encouraged rather than condemned. The courts in this county have never been made the instruments of power in oppressing the citizen, and it can, perhaps, further be safely affirmed that the government has yet to attempt to make use of the machinery of the law for that purpose; and if it should, it seems quite probable that it would be as easy to secure an indictment from a grand jury, as the consent of the court to the filing of an information. This line of observation is, however, scarcely called for, since the court is only concerned on the motion with the lawfulness of a prosecution by information, and is not obliged to vindicate the propriety or policy of this mode of procedure.

The motion in arrest of judgment is overruled.

JUDGMENT ACCORDINGLY.

Confinement of Insane Murderers.

UNDERWOOD v. PEOPLE.

Supreme Court of Michigan, April 27, 1875.

Hon. BENJ. F. GRAVES, Chief Justice.
" THOMAS M. COOLEY, } Associate Justices.
" JAMES V. CAMPBELL }

1. **Trial by Jury—General and Special Verdicts.**—While one of the substantial elements of the right of trial by jury, is the right to give a general verdict on the merits, a special verdict can not be held unauthorized.

2. **Insane Murderers—Special Verdict of Insanity.**—If a jury agrees that a prisoner charged with murder was insane, and would have been guilty if not so, they are

at liberty, though they can not be compelled, to find that fact specially. A general verdict of not guilty, if there is reasonable doubt of insanity, can not be prevented.

3. **Non-Compotes—State Guardianship—Due Process of Law.**—The state has an ultimate guardianship over *non-compotes* where it is necessary, and may provide such protection and care for them as will prevent them from injuring or being injured, if they are dangerous or in need of seclusion. But private liberty can never be subject to the discretion of any one person, and they can not be deprived of liberty without due process of law.

Opinion of the court by CAMPBELL, J.

Underwood brings error upon a judgment of the Recorder's Court of Detroit, whereby he was committed to the State Prison Insane Hospital as a person charged with murder, and acquitted on the ground of insanity. He claimed that the statute is invalid. The statute in question, being act No. 168 of the laws of 1873, entitled an Act to Provide for the Custody and Safe-keeping of Persons who are Tried for Murder and other High Crimes, and are Acquitted by Reason of Insanity, provides in substance, that when the defence of insanity is set up in the cases provided for, the jury shall find specially whether the respondent was insane when the alleged crime was committed, and if acquitted on that ground, the verdict shall so declare. In such case the court is to sentence him to confinement in the insane hospital of the state prison, until discharged in the manner pointed out. This can only be done when the prison inspectors summon (as they are empowered to do) the circuit judge of the circuit from which he is sent, and the medical superintendent of the Kalamazoo Insane Asylum, who are thereupon to examine into his condition, and if they certify that he is not insane, the governor is to discharge him. The finding of the jury is confined to the prisoner's condition at the time of the commission of the alleged criminal act. The indictment or information embraces, and can lawfully embrace, no issue except the prisoner's guilt as charged. The right of trial by jury is secured by constitutional provisions, and it would not be competent to make any substantial changes in its character, as suggested in People v. Marion, 29 Mich. 31. One of its substantial elements is the right of the jury to give a general verdict on the merits. Any collateral enquiry would be foreign to the issue. And as no insane person is subject to be put on trial, a finding that they had been trying such a person would be somewhat inconsistent with the notion that the trial could have been proper. The statute has avoided this error by confining their attention to the time of the offence; and while it is not competent to prevent an acquittal on a reasonable doubt of insanity, which would require a general verdict of not guilty, yet if the jury agree that the prisoner was insane, and that he would have been guilty if not so, they are undoubtedly at liberty, though they can not be compelled, to find that fact specially. We can not hold a special verdict or finding unauthorized, as the common law furnishes abundant precedents to the contrary. 1 Hale, P. C. 38.

The questions to be considered must be determined on the assumption that the verdict itself is unauthorized. As insanity, when discovered, was held at common law to bar any further steps against a prisoner, at whatever stage of the proceedings, it was always competent to institute an enquiry into his condition. This investigation was sometimes had by the court alone, and sometimes by aid of a jury of inquest, which is regarded as the safest and most regular practice. See 1 Hale P. C. 29 to 37 *passim*. In England the detention is during her Majesty's pleasure, whether on an acquittal by reason of insanity, or upon an inquest. See Oxford's Case, 9 C. & P. 305; Regina v. Goode, 7 A. & E. 536; Reg. v. Hodges, 8 C. & P. 195; Rex v. Pritchard, 7 C. & P. 303; Rex v. Dyson, 7 C. & P. 305. In Oxford's case the jury evidently had doubts whether he had actually done the act charged, and subsequent events showed that it was not likely he was dangerous, if insane at all, yet he was never discharged. Our compiled laws, long before this statute, authorized the judge to conduct such an enquiry, when the jury render such a verdict (Comp. L., Sec. 7957), and this is a better course. There can be no reason to doubt the propriety of making provision to secure to such unfortunate persons protection and care, in such a way as to prevent them from injuring or being injured, if they are dangerous or in need of seclusion. The state has an ultimate guardianship over *non-compotes*, in cases where it is necessary.

But, inasmuch as such authority can only exist over those who are thus disqualified, the power of determining their condition is one of great importance, and one which espcially involves judicial oversight. In this country, where all legislation must be within constitutional limits, and does not reach the full parliamentary range, private liberty can never be subjected to the mere discretion of any person. No one can be deprived of liberty without due process of law. Any involuntary control or seclusion is imprisonment, and that is only justifiable when enforced under valid laws. Every person has a right at all times to resort to the courts to have the legality of restraint determined, unless he is imprisoned under a valid judgment, under proceedings where he had a regular trial or hearing.

The present statute requires the respondent to be confined until he is discharged in the manner pointed out by the act. This requires, *first*, the action of the prison inspectors, for whose action the statute has made no provision unless they choose; *second*, the summoning of a circuit judge from any part of the state to the state prison, and the summoning of the asylum surperintendent from Kalamazoo to the same place; *third*, a joint examination and agreement, either being competent to balance the other, and their disagreement turning the scale in favor of imprisonment. It was held in People Ex Rel. Atty.-General v. Lawton, Judge of Probate, October Term, 1874, that a law was not enforceable unless it furnished adequate means to secure the purposes for which it was enacted. See also People v. Smith, 9 Mich. 193. It would be attributing more than folly to the legislature to assume that they would intentionally pass a law which would leave a sane man liable to perpetual imprisonment, where he has been acquitted of crime. There is nothing in this law or elsewhere, which could compel the performance of the functions necessary to release a sane person committed to the insane asylum. The inspectors of the prison act, or not, as they see fit. Neither the prisoner nor his friends can compel action. No circuit judge can be compelled to perform functions not judicial in that capacity, and if he could, the law points out no means of bringing him and the medical superintendent away from their own counties at the command of a board of inspectors. The law furnishes no means of summoning and swearing witnesses, or securing the means of a fair examination, or of determining any rules of action. But the more serious difficulty is in the nature of the proceedings themselves. In the first place, the prisoner is sent into confinement without any legal investigation into his condition at that time, when he may be perfectly sane, and when, having been acquitted, he is entitled to all the privileges of any innocent man. There may be a very long interval between the offence and the trial.

Having been so secluded, he is excluded from the right, and all others are excluded from the power, of resorting to any effectual means, or any means whatever, of securing a judicial enquiry into his sanity. Neither judge nor expert has any power under our constitution to select his own means and process of enquiry, and pass *ex parte* upon the liberty of citizens. The proceedings contemplated by this statute, are not only inquisitorial and *ex parte*, but the officers selected, who are undoubtedly as fit as any one to conduct such enquiries, have no power to act until the inspectors choose to call them. It practically leaves the liberty of the person confined to depend upon the uncontrolled pleasure of the inspectors. A more dangerous scheme, and one more entirely opposed to the constitutional provision securing to every one the protection of due process of law, could hardly be devised.

It is a result of the dangers which have been multiplied by the absurd lengths to which the defence of insanity has been allowed

to go, under the fanciful theories of incompetent and dogmatic witnesses, who have brought discredit on science and made the name of experts unsavory in the community. No doubt many criminals have escaped justice, by the weight foolishly given by credulous jurors, to evidence which their common sense should have disregarded. But the remedy is to be sought by correcting false notions, and not by destroying the safeguards of private liberty.

The judgment must be reversed, and the prisoner discharged.

Statute of Frauds—Verbal Promise to Indemnify.

WILDES v. DUDLOW.

[23 Weekly Reporter, 435.]

English Court of Chancery, Decemher 9, 1874.

Before Hon. Sir RICHARD MALINS, Vice Chancellor.

A. verbally requested B. to join W. in a note to raise monev for W., and promised to indemnify B. from any loss that might arise therefrom: *Held*, that this promise need not be in writing, as it was not a promise to answer for the debt of another within the 4th section of the Statute of Frauds.

This was a suit for the administration of the estate of John Dudlow, who died in 1854. The bill was filed in 1868 by legatees. The cause was heard in 1870, and the common administration decree was made. The estate proved insufficient to pay the legacies in full. Thereupon the plaintiffs took out a summons to vary the chief clerk's certificate, by striking out a sum of £1,000, which John Noble Dudlow, the son and one of the executors of the testator, had been allowed to charge against the estate and retain under the following circumstances:

In the year 1853, the testator, who had often assisted his son-in-law, Henry Atkinson Wildes, in raising money, requested his son, John Noble Dudlow, to join Henry Atkinson Wildes in a joint and several promissory note for £1,000, saying that he (the testator) did not like his (the testator's) name going so often to Randall & Co., from whom Henry Atkinson Wildes intended to raise the said sum, and offering to indemnify the said John Noble Dudlow from any loss that might arise from his joining in the said note. John Noble Dudlow was afterwards compelled to pay the said sum, and the chief clerk had allowed his claim in respect of such payment.

Glasse, Q. C., and *Herbert Smith*, for the plaintiffs, contended that this agreement was to pay the debt of another, and was therefore void by the Statute of Frauds as not being in writing. Green v. Cresswell, 10 A. & E. 453; Cripps v. Hartnoll, 31 L. J. Q. B. 150; 10 W. R. C. L Dig. 38; Mountstephen v. Lakeman, 18 W. R. 1001, L. R. 5 Q. B 613.

Higgins, Q. C., and *Grosvenor Woods*, for the defendants. The most recent decisions are against such an agreement being brought withing the Statute of Frauds. Thomas v. Cook, 8 B. & C. 728; Eastwood v. Kenyon, 11 A. & E. 438; Fitzgerald v. Dressler, 7 C. B. N. S. 374; Reader v. Kingham, 11 W. R. 366, 13 C. B. N. S. 344.

Glasse, Q. C., in reply.

MALINS, V. C.—The question is whether this contract is within the 4th section of the Statute of Frauds, and therefore required to be in writing. The words of that section are, "charge the defendant upon any special promise to answer for the debt, default or miscarriage of another." It is a contract between father and son. It is an agreement, not that the father will pay the son the debt of Wildes, because Wildes did not owe him anything, but that if the son will guarantee Wildes' debt he will indemnify him. If one man could induce another to alter his line of conduct in that way, and then set up the Statute of Frauds, that statute, instead of being a protection against fraud, would be a direct means of fraud. It appears to me plain upon principle that the case is not within the statute. It is true there has been a conflict of authority, and I confess I am surprised to find that there has been so much conflict. The point was originally decided in Thomas v. Cook, upon the plainest principles of common sense and justice. I was therefore surprised to find that in the later case of Green v. Cresswell, in the same court, but constituted by different judges, a different view was taken. In Reader v. Kingham, when the full number of judges was present, the case of Green v. Cresswell was overruled, and the law as laid down in Thomas v. Cook restored. The decision in Reader v. Kingham, was questioned in Mountstephen v. Lakeman, by Mr. Justice Blackburn, but his decision was subsequently reversed, and the law now rests on the reasonable ground on which it was put in Reader v. Kingham. I accordingly decide that where one person induces another to enter into an engagement by a promise to indemnify him against liability, that is not an agreement within the Statute of Frauds, and does not require to be in writing. This is a case in which a father induced his son to guarantee the debt of his son-in-law, upon a promise that he would see him harmless. Upon every principle of justice he is bound to indemnify him. The chief clerk has done perfectly right in allowing this £1,000 with interest. Therefore the motion to vary the certificate in that respect must be dismissed with costs.

Solicitors, *Clabon & Fearon; W. Compton Smith.*

NOTE.—Compare Bessig v. Britton, *ante*, p. 296, and cases cited.

Foreign Selections.

CONSIDERATION—FORBEARANCE TO SUE.—That forbearance to sue in respect of a disputed claim which turns out not to be maintainable, is a sufficient consideration to support a promise, is a principle which was laid down with great clearness by Mr. Justice Blackburn in a considered judgment, in Cook v. Wright, 4 L. T. Rep., N. S. 704. And the principle has been applied without hesitation in the recent case of Wilby v. Elgee, in which the court of common pleas refused a rule on Saturday last. The facts were these: The plaintiff was a widow, of whom the defendant, in 1867, had borrowed 20*l.* during the lifetime of her husband. Shortly after the death of the husband, the defendant gave the plaintiff an I O U for the amount. In 1871 a person whom the court held to be acting for the plaintiff, demanded the money, and the defendant in answer promised to pay, with many deprecations of legal proceedings, but the money not being paid, it became necessary to issue a writ. The writ, however, was not issued until 1874, when the original debt had become barred by the statute of limitations, so that it became necessary for the plaintiff to rely upon the defendant's promise in 1871. The jury found for the plaintiff, that in forbearing to sue she had acted upon the defendant's promise to pay in 1871, and the court refused a rule to enter the verdict for the defendant. Among the many points made for the defendant was this, that the money lent was her husband's money, so that she had in reality no claim to forbear. But Lord Coleridge pointed out that it had been held on very good grounds that it was sufficient if the claim forborne were reasonably doubtful, and as the I O U had been given to the plaintiff in her own name, we think that the principle to which we have referred was very properly applied. As was said by Chief Justice Cockburn, in Callisher v. Bischoffeim, L. Rep. 5 Q. B. 452: "Every day a compromise is effected on the ground that the party making it has a chance of succeeding. When such a person forbears to sue, he gives up what he believes to be an advantage, and the other party gains an advantage, and instead of being annoyed with an action, he escapes from the vexations incident to it." And in Llewellyn v. Llewellyn (3 D. & L. 318), a declaration was held good which alleged that there were disputes concerning accounts between the plaintiff and defendant, and in consideration that the plaintiff would relinquish all claims the defendant promised to pay the plaintiff an annuity, although there

was no allegation that any sum was due to the plaintiff, and it might have turned out that the plaintiff's claim could not be made good. Of course if a plaintiff knew he had no cause of action, and *mala fide* induced the defendant to believe that he had, the principle would not apply. See Wade v. Simeon, 2 C. B. 548.—[*The Law Times.*

RESPONSIBILITY OF POLICY-HOLDERS FOR ACTS OF INSURANCE AGENTS.—In the recent case of *In re* The Universal Non-Tariff Fire Insurance Co., *ex parte* Forbes, Malins, V. C., thus concluded his judgment: "Was Donald, the agent of the company, to inspect and describe the property to be insured? Upon a careful consideration of all the evidence in this case, I am of opinion that the description of the property was given to the company by Donald as their agent, and did not proceed from the assured at all, and that they are, consequently, not responsible for the mistake which was made as to the felt roof or any other misdescription of the property." We need not recapitulate the facts of that case, to which we very fully adverted in our previous papers on "Conditions in Policies of Life Insurance." *Ante*, pp. 111, 125. But, in addition to its bearing on the doctrine of warranties in policies of insurance, that decision is noticeable as affecting the question of the responsibility of policy-holders in respect of misdescriptions by the agents themselves of the insurance companies Upon that subject there is a remarkable paucity of reported authority. Yet the question is one, indeed, of very great importance, and any consideration of the startling effects of the doctrine of warranties would be incomplete without referring to the decision of Lord Lyndhurst, in Parsons v. Bignold, 15 L. J. Ch. 399 (1846), holding that if the agent of the office act, also as agent of the assured in effecting the assurance, even an unintentional misstatement through such agent may be a breach of warranty. In that case it appeared that a party applied to the agent of an insurance office to effect an insurance on the life of his son. The agent gave to him a printed form of application, which was filled up, as to the name, age, etc., of his son, and signed, but he did not fill up the declaration as to the nature of his pecuniary interest in his son's life. The agent had enquired into these particulars, and filled them up, after the insurer had left his office, with a statement which was incorrect. The insurance was effected; but on the death of the nominee the company refused to pay the amount of the policy, on the ground that the interest of the insurer was falsely described, and that the policy was therefore void. No evidence being produced as to the statements which were made to the agent respecting the matters inserted by him in the declaration, the court refused to rectify it, or to grant an injunction to restrain the company from setting up the declaration as a defence to an action at law. In a recent American case, Cheek v. Columbia Fire Insurance Company, * M'Farland, J., delivering the judgment of the Supreme Court of Tennessee, said: "Even if the written application be construed to contain statements inconsistent with the facts, still, in cases where the application is made out by the agent of the underwriters, and the facts are fully disclosed to him, and he fails to insert them, this will not avoid the policy. Upon this question the defendants' counsel have referred us to a large number of cases, and it is maintained that this is in conflict with the rule which rejects parol evidence to contradict a written contract, and is only allowed in exceptional cases, where the facts untruly stated are of a public or notorious character, or where there is fraud, accident or mistake. We can not review, or undertake to reconcile, these authorities. We can only give the rule, which is sustained by one class of authorities, and which we think is sound. The agent who fills up the blanks, or makes out the written application, is still in this the agent of the insurers, and not of the insured. He is in the employ of the insurers, it is his duty to represent them, and protect their interest, and he can not rightfully divest himself of this character, although the application is in form the act of the insured. Bearing this in mind, and regarding the acts of the agent as the acts of the company, then if we assume that the facts are fully disclosed to him, and he fails to state them truly in the application, it would be manifestly against all sound principle to allow any false statement thus inserted in the application to avoid the policy. It would be to allow the defendants to take advantage of their own wrong. It would put it in the power of the agent to destroy the effect of the policy, without fault upon the part of the applicant. Of course, if actual collusion be shown between the agent and insured, the case would be different. This may be placed either upon the ground of fraud or estoppel. We refer to the cases of The Insurance Co. v. Wilkinson, 13 Wallace, 222, and the Planters' Insurance Co. v. Sorrells, by this court, at Nashville, Mss., recently decided as authorities for this holding. In the former case, it was said, this does not come in conflict with the rule rejecting parol evidence to vary a written contract, but proceeds upon the ground that the application in such case is not the statement of the applicant." The Supreme Court of Errors of Connecticut, however, seems to have entertained a different view, in the contemporaneous case of Ryan v. World Mutual Life Insur. Co. (CENT. L. J. Feb. 19, 1875), † where it was held as follows: In a suit on a policy of life insurance, the plaintiff can not claim that the local agent of the company wilfully, and without the knowledge of the plaintiff or the insured, wrote the answers in the application incorrectly, for this is an attempt to substitute a different parol contract for the warranties and representations contained in the written agreement. Where the agent well knew that if correct answers were given in the application, it would be rejected by the company, and therefore he sought to obtain a policy by means of false answers, the company was not responsible for an act which could not have been contemplated as being within the scope of the agency. Where the plaintiff was either an accomplice or instrument in the perpetration of a fraud on the company, she is not entitled to recover, on the ground that where one of two innocent persons must suffer by the fraud, negligence, or unauthorized act of a third, he who clothed the third with the power to deceive or injure must be the one to suffer. It was inexcusable negligence in the plaintiff to sign an application without reading it or knowing its contents. The law presumes that all reasonable diligence will be used to see that the answers are correctly written. A limited agency in a case of life insurance will not be extended by operation of law, to an act done by the agent in fraud of his principal, and for the benefit of the insured, especially where it is in the power of the insured, by the use of a reasonable diligence, to defeat the fraudulent intent. Any waiver or estoppel, to be effectual, must be made by an authorized officer of the company.

In a yet more recent case, American Life Insurance Co. v. Mahone (Albany Law Journal, March 6th, 1875), it appeared that among the questions propounded to Dillard, whose life was insured, was the following, marked No. 5: "Is the party temperate and regular in his habits?" to which the answer was "Yes." The answers in the "proposals for insurance" were all written by Yeiser, the agent of the company; but Dillard signed his name at the bottom. Evidence was offered to show that Dillard's answer was not "Yes," but "I never refuse to take a drink," or "I always take my drink," and that the answer "Yes" was improperly written down, without the knowledge or consent of Dillard. The evidence was received under objection, and this raises the most important point in the case. Strong, J, who delivered the opinion of the court, said: "That there is no substantial reason for complaining of the ruling of the court in this particular is, we think, fully shown by what was decided in Insurance Company v. Wilkinson, 13 Wall. 222, and in the cases therein mentioned. The testimony was admitted not to contradict the written warranty, but to show that it was not the warranty of Dillard, though

*1 CENT. L. J. 465.

†S. C., in full, 4 Ins. L. J. 37.

signed by him. Prepared as it was by the company's agent, and the answer to No. 5 having been made, as the witness proved, by the agent, the proposals, both questions and answers, must be regarded as the act of the company, which they can not be permitted to set up as a warranty by the assured. And this is especially so when, as in this case, true answers were in fact made by the applicant (if the witness is to be believed), and the agent substituted for them others, now alleged to be untrue, thus misrepresenting the applicant, as well as deceiving his own principals. Nor do we think it makes any difference that the answers, as written by the agent, were subsequently read to Dillard and signed by him. Having himself answered truly, and Yeiser having undertaken to prepare and forward the proposals, Dillard had a right to assume that the answers he did make were accepted as meaning, for the purpose of obtaining a policy, what Yeiser stated them in writing to be. The acts and declarations of Yeiser are to be considered the acts and declarations of the company, whose agent he was, and Dillard was justified in so understanding them." Those decisions throw light upon a branch of insurance law which is but little treated of in the standard text-books on the subject, but which is deserving of the most serious attention, not only by policy-holders, but by the agents of the companies, for though they are such agents for the purpose of receiving and forwarding proposals, yet at the same time, in acting for the parties making the proposals to the extent of the delegated authority, the company's agents are also the agents of the assured, and notwithstanding their official capacity, it is important to remember that carelessness or mistake on their part may jeopardise the insurance.—[*The Irish Law Times.*

A Bird's-Eye View of the Court and Counsel in the Tilton-Beecher Case.

VIII.

ROGER A. PRYOR.

This gentleman, who is one of the senior counsel for the plaintiff, figured quite conspicuously in the argument of the motion which was made by the defendant for a bill of particulars. He argued the motion in opposition to the defendant's counsel in the city court, and afterwards in the court of appeals, at Albany, where he made a successful and an elaborate effort, Mr. Evarts being opposed to him. The court of appeals gave no positive decision upon the issue of law arising on the appeal but remitted the matter back to the city court, leaving the question to the wise judgment and discretion of that court, whether or not, under all the circumstances of the case, the bill of particulars ought to be granted. The general term of the city court finally denied the motion. Mr Pryor, is commonly called "General," from his having served as an officer in the confederate army—and having acquitted himself with credit. He was a member of Congress representing one of the districts of Richmond, at the time of the outbreak of the rebellion, and from that time forward and until the close of the war, took an active part on the side of the confederate cause. Soon after the war ended he came to New York and commenced the practice of his profession, since which time he has acted as counsel in a number of cases of importance, and has achieved considerable reputation as an analytical searcher-out of law points, and as a speaker of force and eloquence. In the case now depending in Brooklyn, he has taken no very active part in the matter of examining or cross-examining of witnesses, but has employed much of his time in collating, developing and illustrating the law points as they have arisen from time to time in the course of the trial. His appearance is somewhat peculiar and striking;—he is about six feet tall, slender, and of nervous temperament, wears his hair rather long, has a smooth face,—no facial appendages of hair,—and the general bearing and appearance of a person of decided and positive elements of character—both in thought and action. The lines about the mouth seem to indicate that he has engendered, in some way or other, a misanthropic, or scornful opinion of mankind,—the under lip over-lapping the upper. He possesses a florid, an impassioned style of oratory, characteristic of southern speakers, that is, very rapid in his enunciation, his thoughts, as it were, crowding upon his utterance. It devolved upon Mr. Pryor to answer the argument of Mr. Evarts, on the question of the admissibility of the plaintiff as a witness in his own behalf. In his investigation of the subject, he touched upon the levitical law, which held that both husband and wife should suffer death for the act of adultery; and the acts of the Puritans, in Great Britain, in 1650, when a law was passed denouncing death against adultery, and the repeal of that law upon the return of the Stuarts; and illustrated that adultery never was a crime at common law, *and is not a crime to-day in New York state.* But is regarded simply as a private wrong, exposing the *tort feasor* to an action for civil damages, but not to a criminal prosecution. This defect in the New York law has worked great hardship and injury, and is a scalding stain upon the escutcheon of the jurisprudence of that state. In reviewing and discussing the points raised by Mr. Evarts, and more particularly in illustrating the true intent and meaning of the law of 1867 relative to husband or wife testifying for or against each other, Mr. Pryor used clear and explicit sentences and logic—and we can do no better than to give his words verbatim on the law of 1867 as being of much interest to the reader. He said (in referring to the case of Dann v. Kingdom, N. Y. Supreme Court Repts., as also to the statute):

My learned friend, using the license legitimately belonging to counsel, imagined that this case had been argued by the profession with research and vigilance; but the report exhibits nothing of the kind, and the opinion of the judge himself, as you will observe, is embodied in this brief, curt paragraph:

"The plaintiff was not a competent witness to prove such marriage. The act of 1867, to enable husband and wife to be witnesses for and against each other (Laws 1867, Chap. 887), expressly excepts the cases where the question of adultery of the husband or wife is in controversy, except to prove a former marriage, in case of bigamy, and the fact of marriage in actions of divorce."

Thus you perceive that the learned judge arrives at the conclusion by no process of reason, nor is he sustained in the conclusion by any citation of authority, but he merely reaches it *per saltum*, and announces it oracularly as an *ipse dixit*. And what is that *ipse dixit*? Why, that the act of 1867 prohibits a wife, in an action involving a question of adultery, from being a witness. Now, sir, the act of 1867 accomplishes no such thing. The decision, therefore, is founded upon a plain, palpable misreading and misconstruction of the very act upon which it purports to be founded. Bear in mind, now, the words of the judge, that this second section of the act of 1867 forbids a party in action involving a question of adultery from being a witness, that is to say, from being a witness absolutely and unqualifiedly. He announced the proposition in general terms without restriction or modification; whereas, what are the terms of the act itself?

"Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other."

Not competent or compellable merely to give evidence, but competent and compellable to give evidence for or against the other.

"In any criminal action or proceeding (except to prove the fact of marriage, except in case of bigamy), or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation."

Now, sir, the sentence is long and involved, and likely upon a cursory perusal, inasmuch as the qualifying clause is found in the second line of the sentence, before the learned judge arrived at the concluding line he had dropped from his mind and his memory those qualifying words, namely, "for or against the other." So he announced that this act, in peremptory and absolute terms excluded husband or wife from being a witness in an action of criminal conversation; whereas, the act only excludes husband or wife from being a witness in an action of criminal conversation for or against the other.

The counsel then cited several cases bearing upon the question at issue, among them a case in 7th Robinson's Reports, the case of Bunnell v. Greathnead, 49 Barbour, 106, which was an action of criminal conversation, and where the plaintiff

was admitted as a witness and testified to the fact of the wife's adultery. Also the cases of Petrie v. Howe, Vol. 4, New York Supreme Court Reports, page 85, which case was decided in 1874,—a case of criminal intercourse, where the husband was permitted to testify without question of his competency as a witness.

In Greenleaf's Evidence, vol. 1, sec. 342, we read: "But they, the husband and wife, are not admissible as witnesses against each other where either is directly interested in the event of the proceedings, whether civil or criminal." (Speaking of the common law): "Yet in collateral proceedings not immediately affecting their mutual interest, their evidence is receivable, notwithstanding it may tend to criminate, or may contradict the other, or may subject the other to a legal demand."

And so Mr. Phillips, in his book touching upon the rule just referred to from Greenleaf, says, in so many words:

Although the husband and wife are not allowed to be witnesses against each other where either is directly and immediately interested in the event of a proceeding, whether civil or criminal, yet in collateral proceedings not immediately affecting their mutual relations, their evidence is receivable, notwithstanding that the evidence of the one tends to contradict the other, or may subject the other to a legal demand or even to a criminal charge.

It will readily be seen that these two authorities, on this particular point, run in the same line and groove. And from the several New York authorities on the admissibility of a plaintiff to testify in actions of this character, there seems to be little room for doubt on the question that the husband or wife may give their testimony in matters which only affect each other collaterally.

Thus, Mr. Chief Justice Neilson rendered his decision, holding in effect, that the plaintiff was competent to be sworn and to testify in his own behalf; but was not competent to testify to any confidential communications; and his honor remarked that this qualified direction respected the present state of the law of evidence, as the same has received legislative and judicial expression.

It is rumored that Mr. Pryor is, in connection with Mr. Beach, to sum up the case on behalf of the plaintiff. If it be so, it will give him a glorious opportunity to indulge himself in his royal eloquence, and certainly the importance and magnitude of the issues involved would warrant him in making the grandest forensal effort of his life. BETA.

NEW YORK.

Correspondence.

DOWER—DAVIS' ESTATE, 36 IOWA, 24.

KEOKUK, IOWA, May 5th, 1875.

EDITORS CENTRAL LAW JOURNAL:—A recent decision of the Supreme Court of Iowa, and contained in the 36 Iowa Reports, page 24, in the matter of the estate of Jacob Davis, deceased, although satisfactory to the bar, and no doubt a true construction of our laws on the subject of dower, will undoubtedly lead to legislation on that subject at the next session of our legislature. As your journal has a wide-spread circulation in Iowa, I suggest the insertion of this opinion in your next issue. It will be seen how easy a matter it would be for a husband to convert his real estate into personalty and then devise it to his children, or even strangers, to the entire exclusion of his wife, thus leaving her penniless, saving her rights in the homestead, if he left one. The doctrine of dower in lands had its origin, no doubt, in the feudal system, and at a period when personalty constituted but a *very small* part of the wealth of a country as compared at the present time. In large towns and cities a large part of the wealth of merchants, bankers and business men consists of personal property, and in many cases the wife, on marriage, or by inheritance, afterwards has contributed more to the capital stock than the husband; yet, if left under his control and reduced to his possession in her life-time, it is in his power by will to divest her of every dollar of his personal estate. It is not infrequent that the wife, by her industry, frugality and business capacity, contributes quite as much as the husband in the acquirement of property, and in case the same is personalty, to invest the entire disposition of the same in the husband, and who, under the present law of Iowa, might, as decided in the case of the estate of Jacob Davis, (*supra*), bequeath it even to a stranger, thus leaving her in her old age without a dollar, calls for a change of the law on this subject. Why, the wife can not be divested of her right of dower in all lands of which the husband is seized during marriage, except by her voluntary act, and be shorn of every dollar in personalty, I cannot reconcile on any principle of justice or right. C. W. LOWRIE.

[We do not see the necessity of printing the case above mentioned in the JOURNAL. Volume 36 of the Iowa Reports is in the hands of the profession throughout that state; and hence the observations of our correspondent will prove sufficient to direct attention to the evil complained of.—ED. C. L. J.]

Recent Reports.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF MISSOURI. Vol. 56. By TRUMAN A. POST, Reporter. St. Louis: W. J. Gilbert. 1874.

The statute requiring that every decision of the supreme court, no matter how unimportant or frivolous the case, or how often the questions involved have been decided and reported, shall be reduced to writing by the judges, and published by the reporter, although, perhaps, a considerable advantage to the publisher, increasing the number of volumes required, certainly contributes largely to make the reports of our state, what all well-read lawyers will readily agree in pronouncing them to be, among the poorest now offered to the public and the profession. An effort was made at the last session of the legislature to have this absurd and expensive law repealed or modified, but an intelligent (!) judiciary committee reported adversely; and thus the people of the state stand in the anomalous position of refusing to invest their supreme judges with a needful and proper discretion in selecting the causes which should be reported at length, and discarding those which are too unimportant, or which involve questions which have been decided and reported over and over again, and in which the preparation and publication of written decisions *in extenso*, constitute a vicious and unwarranted waste of time and money. The volume before us presents many illustrations of the consequences of the law as it now stands. In The State v. Miller, p. 125, nearly a whole page is occupied by the report of the case, which is as follows:

The State of Missouri, Respondent, v. Fred. Miller, Appellant. 1. Practice, Supreme Court—Bill of Exceptions—Record. Nothing is brought to the supreme court without a bill of exceptions, except the record proper. Appeal from St. Louis Court of Criminal Correction. Adams, Judge, delivered the opinion of the court.

The defendant was prosecuted, and convicted in the St. Louis Court of Criminal Correction of an assault and battery. He filed a motion for a new trial which was overruled, and he appealed to this court. There was no bill of exceptions tendered or filed, and the case stands before us upon the naked record, there being no assignment of errors or briefs of counsel on either side. I have examined the record and find the information sufficiently formal and substantially good. The trial and judgment appear to be regular, and I find no error in the record.

Judgment affirmed; Judge Sherwood absent, the other judges concur.

No more eloquent commentary could be made upon the absurdity of the law which compels the judges to prepare and the reporter to publish written opinions in such cases as this, or the looseness of practice which is indicated by the conduct of the cause, and the patience of the judges in dealing with it, than the instance we have given; and the volume is marred by many similar ones. The mechanical execution of the book is by no means what it should be. The paper is far from first-class, and the type old and worn. A careful proof-reader has done much to repair the errors of inefficient printers, but without producing by any means a "good job." In fine, there must be much improvement in very many respects, before the Missouri Reports regain their proper place in the estimation of those who have occasion to use them.

Railway-Aid Bonds—Mandamus to Compel Levy of Tax Beyond Statutory Limit.—State, *ex rel.* Aull v. Shortridge *et al.*, p. 126. County courts have no power to levy a tax to meet indebtedness of the county on bonds issued in aid of railways beyond the limit of tax allowed to be levied by statute. See same case reported in full, 1 CENT. L. J. 229.

Insurance—Acceptance of Premium—Delivery of Policy—Payment of Premium—Waiver.—Baldwin v. Chouteau Ins. Co., p. 151. The acceptance of premium and delivery of policy, render the contract of

insurance complete and executed; and it relates back to the date of the opening of the negotiation by the filing of the application, and the making and signing of the policy. The actual payment of the premium is not necessary to bind the contract, where credit is extended by the company, and time of payment deferred by agreement, although the policy is not delivered until actual payment. Where a loss occurred after such execution of the policy, and before the actual payment of the premium, the insured is not bound to notify the company of such loss before making payment. Following Keim v. Home Mut. F. & M. Ins. Co., 42 Mo. 38. Citing May on Ins., § 44; Lightbody v. North Missouri Ins. Co., 23 Wend. 18; Hallock v. Com. Ins. Co., 2 Dutch. 268; S. C. affirmed, 3 Dutch. 645; Flint v. Ohio Ins. Co., 8 Ohio, 501; Xenos v. Wickham, 2 Law Rep. [H. L.] 296; Am. Home Ins. Co. v. Patterson, 28 Ind. 17; Kohne v. Ins. Co. of North America, 1 Wash., C. C. 93; Comm. Mut. Mar. Ins. Co. v. Union Mut. Ins. Co., 19 How. 318; Whittaker v. Farmers' Union Ins. Co., 29 Barb. 312.

Sale of Personal Property—Change of Possession within Reasonable Time.—Bishop v. O'Connell, p. 158. No sale of personal property is valid as against creditors or vendor, unless an actual open and apparent change in the possession occurs within a reasonable time after the alleged sale. If the vendor continues in possession, although under color of a lease, the sale will be held fraudulent. Following Claflin v. Rosenburg, 42 Mo. 439; Lessem v. Herriford. 44 Mo. 323. What is a reasonable time, must be determined by the circumstances of each case.

Damages for Injuries Caused by Street out of Repair.—Market v. St. Louis, p. 189. (See this case reported in full, 1 CENT. L. J. 211.) The city was held liable in damages for injury to a team, caused by crossing a street-gutter which had been out of repair two months, although the city authorities had not been notified of its condition.

Confirmation of Land Title by Congress—Good Against Subsequent Grant from the United States.—Le Beau v. Armitage, p. 191. The title of land held under Spanish claim was confirmed in 1811 to the legal representative of one Provenchere, Calvin Adams. The land was located by a survey approved in 1845. The same land was afterward, in 1866, by act of Congress, granted to one Amiot, of whom plaintiff is the legal representative. The family and legal representatives of Adams have continued in possession from the date of the confirmation to him. *Held*, that the United States at the time of granting the land to Amiot, had only the bare legal title, no patent, but a certificate of patent, having been issued to Adams, and that such title should enure to the holder of the original equitable title. Citing O'Brien v. Perry, 1 Black, 138; Smith v. Stephenson, 7 Mo. 610; Polk's Lessee v. Wendall, 9 Cranch, 87; Carrol v. Safford, 3 How. 441.

Statute of Frauds—Guaranty—Verbal Agreement.—Barker v. Scudder, p. 272. A verbal agreement wher in the party sought to be charged agrees to be originally bound, need not be in writing, but if it is collateral to that of a principal contractor, or is that of a guarantor or surety of another, it must be in writing. To constitute a verbal guaranty, it is not necessary that the word "guaranty" should be used. It is sufficient, if it was the intention of one party, that his affirmation should operate as an inducement to the other party to do the thing required, and the other party accepted and relied on such affirmation and promise.

Factor's Lien for Advances—Right to Sell and Reimburse for Expenses and Advances.—Howard v. Smith, p. 314. Where merchandise is consigned to a commission merchant, to be held and disposed of on account of the consignor, without specific directions as to sales thereof, and the commission merchant incurs expense and makes advances on account of such consignment for the benefit of the consignor, the legal presumption is that the consignee has the right to sell, according to the ordinary usages of trade, and reimburse himself for such expenses and advances. Citing Denny v. Rhodes, 18 Mo. 147; Phillips v. Scott, 43 Mo. 92; Brown v. McGraw, 14 Pet. 479; Marfield v. Douglass, 1 Sandf. 360, 3 Comst.; Blot v. Boiceau, Id. 78; Gihon v. Stanton, 5 Seld. 476; Blackman v. Thomas, 28 N. Y. 67; Field v. Farrington, 10 Wall. 141.

Divorce—Desertion—Failure of Husband to Provide Place of Residence.—Messenger v. Messenger, p. 329. The wife is bound to follow the fortunes of her husband, and live where and in such manner as he chooses. If she declines to do so on the ground that he does not provide a suitable place of residence, her refusal, if continued, will be a desertion on which the husband may base an action for divorce.

Executor — Responsibility of for Assets acquired in another State.—Cabanne v. Skinker, Exr., p. 357. An executor can not reach real estate in another state, unless the will be again proven, as the provisions of a will probated here have no extra-territorial force. Nor can he be held liable on his bond for acts done in another state.

Parties—Alien Enemies—Sale of Land under Trust Deed during the War.—De Jarnette v. De Giverville, p. 440. (See same case, 1 CENT. L. J. 226.) Plaintiffs filed a bill to set aside a sale of land in St. Louis, made during the war by virtue of a trust deed executed before the war, securing the payment of notes, the last of which fell due in April, 1861, and was unpaid, the plaintiffs who owed it being then in Virginia, within the confederate lines. *Held*, that such facts did not justify a court of equity in granting relief. The trustee having absolute power to sell on default, it was immaterial what were the circumstances or disabilities of the makers of the dishonored note. Napton, J., dissenting, *held*, that the plaintiffs being alien enemies, were subject to the law of nations, under which they were prohibited from paying their note, hence default in such payment would not authorize a sale by the trustee, and equity would interpose to set the sale aside.

Party-Wall—Rebuilding.—Crawshaw v. Sumner, p. 517. The owner of each building supported by a common wall, has the right to have it supported thereby, so long as it is sound, but when it becomes ruinous or dangerous, either party may rebuild, and the adjacent proprietor who refuses or neglects to join in the expense of rebuilding, can have no right of action for damage or inconvenience occasioned by such rebuilding.

Common Carriers—Liability beyond Route.—Cramer v. American Merchants' Union Express Company, p. 524. This case is a very elaborate and interesting one, and will richly repay perusal. In brief, it decides that when a carrier who accepts goods, marked and destined for a point beyond the terminus of his own route, stipulating in the bill of lading only to carry to the end of his own route, if he there delivers the goods to another carrier in as good condition as received and in the usual course of commerce, his responsibility is at an end; otherwise if he had agreed to deliver at destination.

C. A. C.

Abstracts of Recent Decisions of the Supreme Court of the United States.

[Prepared expressly for this journal, by HENRY A. CHANEY, Esq., of Detroit, Mich.]

Common Carriers by Water — Vessel-Masters. — Insurance Companies v. Steamboat Lady Pike, opinion by Clifford, J. The steamer, with three barges in tow, lashed abreast of her, broadside to broadside, attempted to pass between certain piers in the Mississippi river near St. Paul. The space was too narrow to make the passage safely, and one of the barges struck a pier, and was sunk, to the total loss of a load of wheat. 1. The supreme court will examine the evidence as well as the questions of law in appeals in admiralty. The Baltimore, 8 Wall. 382. The concurrence of both subordinate courts upon the merits of the controversy is not conclusive, though it leaves the burden on the appellant to show that the decree below is erroneous. 2. Carriers of merchandise by water, seeking general employment, are common carriers, and, unless otherwise provided by law, are generally to be held responsible as insurers for all loss and damage to the merchandise, unless it occurred without fault or negligence on their part. 3. A common carrier by water must provide a seaworthy vessel, well furnished with proper motive power, and furniture necessary for the voyage; a crew adequate in number, and competent for their duty with reference to all the exigencies of the intended route, and a competent and skillful master, of sound judgment and discretion, and sufficient knowledge of the route and experience in navigation to be able to perform properly all the ordinary duties required of him as master. Unless otherwise specially provided in the bill of lading or contract of shipment, his duty extends to all that relates to the loading as well as safe-keeping, due transportation and right delivery of the goods, and for the faithful performance of all these duties the ship is liable, as well as the master and owners, Abbott on Ship. 344, Laveroni v. Drury, 8 Exch. 166; Clark v. Barnwell, 12 How. 272; The Cordes, 21 Id. 27; King v. Shepherd, 3 Story, 349; 3 Kent Com. 213; 1 Smith Lead. Cas. (7th Ed.) 387; 1 Smith M. L. 386. 4. The vessel-master's ignorance of danger in the route is not a sufficient excuse for loss occasioned thereby. The vessel-owner appoints him and is responsible for his want of skill and knowledge as vessel-master, and for his negligence and bad seamanship. The owner is bound to employ a master mariner who knows enough about the route to avoid the known obstructions and choose the most feasible track. Tait v. Levi, 14 East, 482. Such knowledge is practically essential in river navigation, because of frequently shifting currents, cross-currents between piers of bridges and snags, sand-bars and shoals, which no degree of skill would enable the mariner or pilot to avoid without prior knowledge of their existence. 5. A disaster caused by the incompetency, unskillfulness or negligence of the master or pilot in charge of the deck, can not be attributed to "inevitable accident." The Morning Light, 2 Wall. 560; Union Steamship Co. v. N. Y. Steamship Co., 24 How. 313.

Findings of Deficiency in Government Contract — Waiver.—

United States v. Shrewsbury, opinion by Swayne, J. 1. Where a contract for the transportation of army supplies, provided, that upon their arrival at their destination, a board of survey should be called to examine their quality and condition, and in case of loss, deficiency or damage, to investigate the facts, assess the amount of loss or injury, and state whether it was attributed to neglect or to the want of care on the part of the contractor, or to causes beyond his control, deficiencies to be charged to the contractor, the following was held to be a sufficient finding: "Packages all correct and in good order, with the exception of nine sacks of corn, deficient; weight agreeing with the B. L. (bill of lading) with the exception of four thousand two hundred and forty (4240) pounds of corn deficient." The board is presumed to have made the investigation necessary to enable them to report their conclusions. 2. Where the contractor raised no objections when the reports were made, and did not raise any until the time of payment, months afterward, when, though it would have been difficult or impossible for the government to reinvestigate the matter properly and obtain the necessary evidence to support its findings; he gave notice that he should claim readjustment and full payment, he was held to have waived any exception which he might have taken at the proper time, and to have been finally concluded when the payments were made.

Construction of Guarantee — Cattle — Reversals of Judgment —First National Bank of Decatur v. Home Savings Bank of St. Louis, opinion by Davis, J. 1. Where a letter of credit guarantees drafts on shipments of cattle, there can be no recovery if the shipments are of anything else. The guarantee is to be technically construed. 2. The term "cattle" comprises the different kinds of stock used for food, including hogs. See Rex v. Chappell, Russ. & Ry. Cr. Cas. 77; Rex v. Whitney, 1 Moody Cr. Cas. 3; Paty's Case. 2 W. Black, 721; Rex v. Mott, 2 East Pl. Cr. 1074-6. 3. To warrant the reversal of a judgment there must not only be error in the record, but such as may have wrought injury to the party complaining. Brobst v. Brock, 10 Wall. 519.

The French Franc and the English Sovereign.—Collector Arthur v. Richard, opinion by Bradley, J. The French franc is worth nineteen cents and three mills of United States money. The mode of computing the value of foreign coin is fixed by an act of March 3, 1873 (17 Stat. at Large, p. 602), which also fixes the value of the English sovereign at four dollars, eighty-six cents and six and a half mills.

Eminent Domain.—Secombe v. Railway Company, opinion by Davis, J. 1. There is no limitation upon the legislative power of exercising the right of eminent domain, if the purpose is public and just compensation is paid or tendered to the owner for the property taken. Weir v. St. Paul, Stillwater and Taylor's Falls R. R. Co., 18 Minn. 155; Langford v. Com'rs of Ramsey County, 16 Minn, 375. 2. A regular judgment of condemnation of land under the power of eminent domain, and by a court charged with a special statutory jurisdiction, supported by the facts, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. 1 Redf. Rys. 5th Ed. 271. 3. The unauthorized occupation of land by a railway company, is a trespass for which the company is liable to those who own the land at the time, but does not preclude them from taking subsequent legal measures to have the land condemned for their use.

Patent Law — Infringement — Charge of Profits to Party Guilty of Infringement.— Mason v. Graham, opinion by Strong, J. 1. A charge of infringement upon a patent will be sustained by proof that the object is the same and the means of effecting it substantially the same in both inventions. 2. Where one has infringed upon the rights of a patentee, by manufacturing and selling an improvement upon the article patented, allowance should be made in charging him with his profits, for the reduction in the cost of manufacture resulting from his improvement. The complainant is not entitled to the profits resulting from the defendant's own invention. 3. Where the profits from the sale of an infringing device are mingled with the profits of the sale of the invention to which it is attached, the measure of the profits resulting from the device, can be better ascertained from sales of the device separately, than from an estimate of a rateable proportion of all the profits, obtained on the assumption that the cost of the whole machine is to the cost of the device, as the ascertained profits of the whole are to the profits upon the device alone.

Infringements — What is Not Patentable.—Smith v. Nichols, opinion by Swayne, J. 1. One who sues for the infringement of his patent, may file his disclaimer to any specific part of the invention after the beginning of his suit as well as before, but the judge must see that the defendant is not injuriously surprised. The question of the delay will be open for consideration and the complainant can recover no costs. Tuck v. Bramhill, 6 Blatch. 104; Silsby v. Foote, 14 How. 220; Dolan v. Dolan, 3 Fisher, 197; Taylor v. Archer, 8 Blatch. 315; Myers v. Frame, Id. 446; Guyon v. Serril, 1 Blatch. 244; Hall v. Wiles, 2 Id. 194. 2. An invention to be patentable must be new and of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process or product is but its material reflex and embodiment. A new idea engrafted upon an old invention, but distinct from, and an improvement upon the conception which preceded it, is patentable. The prior patentee can not use it without the consent of the improver, and the latter can not use the original invention without the consent of the former. But a mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents doing substantially the same thing in the same way, by substantially the same means with better results, is not such invention as will sustain a patent. This is so also whether what preceded was covered by a patent, or rested only in public knowledge and use. In neither case can there be an invasion of such domain, and an appropriation of anything found there. In one case, everything belongs to the prior patentee; in the other, to the public at large.

Briefs.

[Members of the profession who send us briefs for notice will confer a great favor by giving their *address*, and by enclosing a brief statement of the points argued. This will save us much labor, avoid the danger of our making mistakes, and render it possible for us to notice briefs when we might not otherwise have time to do so. As it is sometimes convenient for us to cut extracts out of briefs, and as we desire to preserve all good briefs for binding, we should take it as a favor if those who send us briefs would enclose *two* copies.—Ed C. L. J.]

[The following briefs, sent to us by their authors, have been condensed for our columns through the kindness of JAMES HAYWARD, Esq., of the Saint Louis bar. Printed copies of them, respectively, may be procured by addressing the persons named below.]

Where the same Persons are Officers of Two Corporations, Notes Drawn by them against One not Valid to Pay Debts of the other.—Rahm v. King Iron Bridge Works of Topeka, Kansas Supreme Court of Kansas. Argument for defendant in error. Plaintiff in error alleges that the defendant made two notes, each endorsed to Coleman, Rahm & Co., and signed by one Mills as vice-president of the defendant. Defendant argues that said notes are not the notes of defendant, and do not purport to be; and that extrinsic evidence is not competent to show the contrary. It appears that said notes were made to pay debts of the King Bridge Company of Iola, and signed by said Mills as president Defendant claims, that, though Mills was an officer in each company, he can not without authority charge one corporation with the debts of the other. [Address Alfred Ennis, Esq., Topeka, Kansas.]

Alimony given by Divorce Court not Annulled by Subsequent Marriage.—C. P. Brenner, Appellant, v. Dorothea Brenner, *et al.*, Respondent, in the Supreme Court of Indiana. Plaintiff and defendant were married in 1843, and in March, 1871, were divorced, $1800 alimony being decreed, to be paid in instalments. In May, 1871, they were again married; and in May, 1872, plaintiff brought action for divorce, and *it was granted to his wife* with $1400 as alimony. At the second divorce only $300 of the first alimony had been paid. In March, 1873, plaintiff moved for an injunction against any claim of the $1,500 still due, and his motion was overruled. Appellant claims that the first judgment for the alimony is null and void— 1st, because of the second divorce and decree; 2d, because of the full investigation into his ability to pay alimony in the second suit; 3rd, by reason of the second marriage; 4th, because of appellee's agreement to release the first judgment in consideration of the second marriage.

The appellee argues that each judgment was distinct from the other, there being two seperate causes of action, followed by two decrees, the second in no way referring to the former; that the first alimony was in lieu of any interest the wife had in her husband's property at that time, and so of the second decree; that the first alimony became the personal property of the wife, and was due to her at the second divorce as such; and that there is nothing to show any agreement on the wife's part to cancel the first decree. [Address Chas. L. Wedding, Rockport, Indiana.]

Sales under Decree of Court—Homestead to be either Urban or Rural.—G. F. Rogers *et al.*, v. R. S. Ragland *et al.*, in the Supreme Court of Texas. Special brief for Brownson, one of the appellants. It seems that Brownson, under a decree of the probate court, acquired certain lands, by a sale which the respondents now seek to set aside, because the sentence of the district court, in accordance with which the sale was ordered, had been reversed. Argument sustains the sale. Another point concerning homesteads declares that homesteads are either for town or country people, and should be

either urban or rural, and not mixed. [Address Phillips, Lackey & Stayton, Victoria, Texas.]

Effect of War on Partnerships Between Citizens of the Belligerent Countries.—J. M. Booker, Plaintiff in Error, v. J. Kirkpatrick, Defendant in Error, Supreme Court of Virginia. Argument of defendant. The following are the facts: Plantiff and one Halsey formed a partnership to conduct business in Missouri, by the said Halsey, Booker to remain in Virginia. In March, 1861, the firm hired of defendant ten negros, for whose work they gave three notes. The work was performed by December, 1861, and the money became due. On suit brought for payment of the notes, Booker filed a special plea, to the effect that on April 17th, 1861, war broke out, Booker remaining on the confederate side, and the other parties in Missouri, and hence the partnership was dissolved, and the notes became invalid. The defendant admits that, had the partnership been *commercial*, the war would have dissolved it, but claims that the partnership was of such a nature as not to be affected by the war. Defendant discusses four propositions: 1st, the partnership was not dissolved by the war; 2d, the liability of a partner on contracts of the partnership, is not discharged by its dissolution; 3rd, dissolution of a partnership does not constitute failure of consideration of a contract made by the partnership; 4th, Booker could not thus sever from his partner and defend alone. The principal points to sustain defendant's position are, that, as the business was to be conducted entirely in Missouri, and the Virginia partner had nothing to do therewith, the relation was not *commercial* within the meaning used in those decisions declaring commercial partnerships dissolved by war; that the partnership did not interfere with the allegiance of the partners, nor with their duties to their respective governments; and that, if the partnership was dissolved, the liability of either partner for the partnership debts was not discharged thereby. [Address Messrs. Mosby & Brown, Lynchburg, Va.]

Notes and Queries.

Will some of our readers be kind enough to respond to the following:

I. DEVISE—SALE BY HEIR—RIGHTS OF CREDITOR.

WARRENSBURG, MO., May 4, 1875.

EDITORS CENTRAL LAW JOURNAL:—A. died seized in fee of cetain realty. He left seven heirs. He also, just before his demise, made a will, in which he directed his executor to sell all of his estate, both real and personal (deseribing it), and apply the proceeds of the sale of his personalty to various uses. But the proceeds of the sale of his realty was to be distributed equally among his seven heirs. After A.'s death, but before the sale of the realty by the executor, B., one of the seven heirs, made a deed to C., in which he conveyed to C. the undivided one-seventh part of the realty mentioned in the will. Afterwards, the executor sold all the land described in the will. Now did the deed from B. to C. convey to C. B 's interest in the proceeds of the sale of the realty, as against B.'s creditors. Yours, B.

OLATHE, KANSAS, May 5, 1875.

EDITORS CENTRAL LAW JOURNAL:—Will you be so kind as to give us an answer to the following questions, to-wit:

A. sells a plow to B., upon the following conditions: B. gives A. his prommissory note (negotiable) with a condition attached thereto, in effect that the title to the plow shall not vest in B., until said note is fully discharged. The plow is delivered to B. Afterwards, B. sells the plow to C., and the plow is sold from C. by virtue of a writ of attachment to D., a *bona fide* purchaser, without notice of such condition existing between the original vendor, and vendee. No claim is made to the plow by virtue of such condition, until four months have elapsed since maturity of said note of B. to A., and then it comes in the person of E., who is indorsee of said note. A. indorsed said note to E. without recourse. What right has E. against D., the purchaser at sheriff's sale? Have not the payee and indorsee been guilty of such negligence as to estop them from any remedy as against D.? Does the indorsement of the note from A. to E. give E. the title to the plow, the same as A. possessed before the transfer, when the condition attached to said note says in so many words, *that the absolute title shall remain in A. till the note is fully discharged.* W. M. Q.

Summary of Our Legal Exchanges.

ADVANCE SHEETS OF 66 ILL. REPORTS.*

Injunction Bill by Church Trustees to Restrain Pastor from Officiating.—Trustees of Independent Presbyterian Church, etc., v. Proctor. [66 Ill. 11.] Opinion by Lawrence, Ch. J.—Upon bill in chancery, by the trustees of an independent church organization, to restrain their pastor from longer officiating as such, it appeared that the church had no connection with any religious denomination, but was governed by its own rules and customs. One of the customs of the church and society was to elect a pastor every year. In this way, the defendant was elected in 1868, 1869 and 1870, and again in 1871, and he accepted. After the last election, the church session and the church trustees decided not to retain him, but he declined to leave, the trustees claiming that they had the sole power to employ a pastor. They, however, failed to establish this claim. *Held*, that the facts and circumstances were not such as to justify the interference of a court of equity, it appearing that he remained in obedience to the vote of a majority of the society, whose wishes, according to the usages of the church, should control.

Limitation—Color of Title—Payment of Taxes—Good Faith—Disability.—Milliken v. Martin. [66 Ill. 13.] Opinion by Walker, J.—1. The law is settled in this state that the holder of color of title will not be presumed to know of a defect in a prior deed in the chain of title, so as to charge him with bad faith. Hence such holder will not be affected by the fact that the judgment under which the sale was made, through which he claims, was void. 2. It is the settled rule of law that the payment of taxes may be proved by parol testimony in ejectment, where the defence relied on is the limitation under the act of 1839, by payment of taxes for seven successive years upon vacant land under color of title. 3. Where a party having color of title to vacant land pays taxes on the same for the statutory period under the act of 1839, and then goes into possession, the law will presume good faith, and it is for the party resisting the bar of the statute to show bad faith. 4. Under the limitation law of 1839, there are two states of fact under which a minor *feme covert, lunatic*, etc., may avoid the bar, after disability ceases. Where the land is occupied it may be avoided by bringing suit within three years after the removal of the disability.

Alteration of Written Instrument—Evidence—Questions of Law and Fact.—Milliken v. Martin. [66 Ill. 13.] Opinion by Walker, J.—1. Where an instrument offered in evidence has the appearance of having been altered, as when a portion of it is in a different ink and handwriting from the body of it, the law raises no presumption as to when the change was made, or by whom, but these are questions of fact to be found by the jury. 2. In such a case the jury, in determining the question, will look at the instrument itself for an explanation, as well as to all the circumstances in evidence; and if an alteration is apparent, it is for the jury to determine whether it was made before or after its execution, and with or without the consent of the maker. 3. Whether an alteration of an instrument is material, is a question of law for the court, and should not be submitted to the jury.

Sale of Fixtures and Assignment of Lease—When Title Passes—Measure of Damages.—Roddin v. Shurley. [66 Ill. 23.] Opinion by Breese, J.—1. Where a contract was made for the sale of personal property and the assignment of a lease for the building in which the fixtures were, and the delivery of possession of the leased property and fixtures, and the payment of the balance of the consideration, were made concurrent acts: *Held*, that the title to no portion of the property would pass until these acts were performed. 2. Where the plaintiff bargained for the assignment of a certain lease interest, and the purchase of the personal property connected with the leasehold premises, and paid $2,000, and the defendants neglected to deliver possession at the time they had agreed to, and it appeared that the personal property was only of the value of $1,500: *Held*, that the plaintiffs, in a suit to recover damages for breach of the contract, were not limited to the differences between the value of the personal property and the money paid, as the contract for the lease and the fixtures was entire. 3. Where the damages recovered by the plaintiffs for the non-delivery of personal property purchased and neglect to transfer a lease according to contract, was only the sum paid by them on the contract, with legal interest thereon: *Held*, that the damages were not excessive.

Setting Aside Deed on Ground of Undue Influence—Quantum of Proof—Mental Capacity.—Wiley v. Ewalt. [66 Ill. 26]. Opinion by Breese, J.—1. On bill to set aside a deed made by an aged person, in the nature of a testamentary disposition, on the ground of undue influence and want of sufficient mental capacity, the proof failed to show that any one made any suggestions to the grantor as to what disposition should be made of the property, or that he did not, of his own volition, select the persons who should be the recipients of his bounty, and the several persons charged with having influenced his action denied, under oath, that they ever advised him to make such disposition of his property, and this was not overcome by any evidence in the record: *Held*, that the charge of undue influence was not sustained by the proof. 2. Where a deed, made by a party in the nature of a testamentary disposition, giving the bulk of his remaining property to his four daughters after his death, was sought to be set aside by a portion of his heirs, on the ground that his mind had become impaired by reason of his advanced age and by the use of intoxicating liquors, it appeared, from the evidence

*Courtesy of Hon. Norman L. Freeman, Reporter, Springfield, Ill.

that the deed was made at the age of seventy-six years, just on the eve of his second marriage, and that at that time his memory only was somewhat impaired, but that he still possessed a sound, practical judgment in business matters; and it further appeared that he had exhibited judgment in making the disposition of his property, by reserving to himself the absolute control of the same during his life, and that he had previously given his other children property, while the four daughters had got but little, so that the disposition was not very unequal; and it further appeared that he was then a vigorous man for his age, and that the disposition was not made from any sudden impulse, but in pursuance of a purpose formed to that effect many years before: *Held*, that the facts would not justify a decree, setting aside the deed. 3. In order to justify the setting aside of a deed where no undue influence is shown, on the ground of mental incapacity from age, it must be shown that the grantor was affected with such a degree of mental weakness, as to render him incabable of understanding and protecting his own interests. The circumstance that his mental powers had been somewhat impaired by age, is not sufficient, if he still retained a full comprehension of the meaning, design and effect of his acts.

Mistake in Sheriff's Return.—Higgins v. Bullock. [66 Ill. 37.] 1. Where a summons was directed to the sheriff of Wabash county, and the officer's return of service commenced "State of Illinois, Nash county:" *Held*, that the word "Nash" was an evident misprision, and that the name of the county in the venue of the return was without any effect upon the return. 2. Where a summons was directed to the sheriff of Wabash county, and the officer serving signed his name as "sheriff," without stating of what county: *Held*, that the return should be taken in connection with the direction and command in the writ, and should receive a construction in support of it; and that it would be intended he was sheriff of Wabash county.

Forcible Detainer—When an Additional Bond may be Required on Appeal.—Ryder v. Meyer. [66 Ill. 41.] Opinion *per curiam*. The statute authorizing the circuit court to require a new bond in the case of an appeal by the defendant, in an action of forcible detainer, from the judgment of a justice of the peace, does not authorize the exercise of that power previous to the commencement of the term to which the appeal is taken.

Chancery—Relief Against Judgment at Law—Judgment on Gaming Contracts—Enforcement of Contract Extending Time of Redemption.—Lucas v. Nicholas. [66 Ill. 41.] Opinion by Lawrence, Ch. J.—1. Where the maker of a promissory note given for money bet on the result of an election, neglected to make his defence at law when sued: *Held*, that a court of equity would not relieve against the judgment. 2. But, owing to the statute prohibiting gambling at cards or other games, a court of equity will set aside a judgment upon a note given for money won in gaming, notwithstanding the maker had a complete defence at law. 3. It seems that, if a purchaser of land under an execution prevents the judgment-debtor from redeeming within the twelve months, by promising to extend the time, and then refuses to permit the redemption, a court of equity would grant relief, even though the contract rested merely in parol, on the theory of presumptive fraud. 4. But an agreement to give further time to redeem from sheriff's sale of land, made after the expiration of twelve months from the day of sale, would not be obligatory, if made without consideration, or if resting in parol, when the statute of frauds is set up. Such a promise could not operate as a fraud upon the debtor by inducing him to sleep upon his right of redemption, as such right would not then exist.

False Imprisonment—Mock Judical Proceeding.—Price v. Bailey. [66 Ill. 49.] Opinion by Breese, J. Where A. procured B. to assume the office of constable and arrest a boy on a charge of breaking a glass in his show case, and the boy was carried before C., who falsely assumed to act as justice of the peace, when the form of a trial was gone through, the boy being refused the privilege of seeing an attorney, and judgment was rendered against him for three dollars, and the parties then threatened him with imprisonment in the county jail, unless he could get two good men to become surety for him, which he finally procured, and was then released, after having been detained about two hours: *Held*, that the facts fully warranted the jury in finding the defendants guilty, in an action by the boy for trespass and false imprisonment, and assessing the damages at $125.

Trespass de Bomis Asportatis against Tax Collector by Lein-Holder.—1. In order to maintain trespass for taking and carrying away personal property, the plaintiff must be the owner of the property, or in posession, at the time of the alleged trespass. The mere fact that he had a lien upon the property as landlord, for rent due, will not enable him to maintain the action; neither will the levy of a distress warrant by him upon the property, where no sale is shown, and it does not appear to have been in his actual possesion. 2. Where the plaintiff sued the tax collector in trespass, for levying upon personal property for the taxes of a third person, and the plaintiff set up that a portion of the taxes were illegal. *Held*, that the legality of the taxes was not a material question in the case, as, if the property belonged to the plaintiff, it mattered not whether the tax was legal or illegally assessed.

Foreclosure—Order for Possession.—Freeman v. Freeman. [66 Ill. 53.] After the confirmation of the master's report of sale, and of the execution of a deed to the purchaser of mortgaged premises under a decree of foreclosure, the court, upon proof of notice to the defendant in possession, of the application, granted an order upon the defendant for the surrender of the possession to the purchaser, which was duly served. The original decree contained no direction that the mortgagor surrender possession in case of a sale: *Held*, on appeal from the order, and there was no error in making it.

Legal News and Notes.

—A FRENCH paper makes merry at some of the disquisitions of English magistrates on the administration of corporal punishment. "Fortunately such old-fashioned notions of school discipline are no longer to be found in France."

—BEFORE Mr. Serjeant Ballantine left Bombay, he was presented with an address by 1800 natives, who thanked him for his efforts to secure justice to the Guicowar. They also gave him a shawl as a token of gratitude. A Sanscrit ode was sent to him by "the Rajkote Association for the Promotion of Arya Samaja," in which he was told that "the word Ballantine," according to Sanscrit, signifies "a person possessing mighty strength."

—LAWYERS V. RAILWAY ACCIDENTS.—A case came before the Court of Exchequer on Saturday, in which Mr. Bulwer, Q. C., moved for a rule *nisi* for a new trial, on the grounds of excessive damages and misreception of evidence. This, said the learned counsel, was an action arising out of the Thorpe accident. Baron Bramwell remarked that all the motions before the court that day had arisen out of railway accidents. What, asked the Lord Chief Baron, if there were no railway accidents, would the lawyers do? Mr. Bulwer feared they would fare very badly; it was an ill wind that blew nobody good. In the result the court granted a rule *nisi*.—[*The Law Times*.

—ACCORDING to the telegraph, Judge Mortill of the United States District Court, for the Eastern District of Texas, in his charge to the grand jury on the 4th instant, reviewed the civil rights law, and expressed the opinion that all persons have legal right to have board and lodgings at inns, transportation on steamers and railroads, or stages, and entrance in theaters, while they do not thereby acquire any social right. To hold that a conductor of a railroad train can not assign a special car to ladies and children and their attendants to the exclusion of all others, provided the other passengers are furnished with other cars, with all the necessary facilities for traveling, would, he says, be to stab social rights, privileges and immunities. Therefore, my view of the act is, that it was not intended to affect social rights through civil and legal rights. In conclusion, the judge said that if it should be made to appear that any innkeepers, managers of theaters or transportation agents, had refused proper facilities to any one on account of race, color or previous condition of servitude, the grand jury would have authority to find a true bill against such persons.

—THE SUIT AGAINST TWEED.—Active preliminary skirmishing in the matter of the new suit commenced against William M. Tweed to recover the $6,000,000 and over, which, it is claimed, he fraudulently obtained from the city treasury, in connection with the building of the new court house, has evidently begun in earnest in the courts. Mr. William H. Peckham appeared before Judge Barrett, in supreme court chambers, yesterday, and remonstrated against the twenty days' extension of time granted to Tweed to put in his answer, and asked that the same be reduced. To give the matter a tangible form, he put his application in the shape of an affidavit, such affidavit simply stating that no bill of particulars would be furnished by the prosecution. After taking the subject into consideration, Judge Barrett gave a compromise decision and reduced the time to ten days. This sort of skirmishing is likely to last for some time, and the probability is that there will not be a general engagement before the fall campaign. Meantime, as a basis to insure the recovery of the $6 000,000 sought to be recovered from Mr. Tweed in the above suit, some 5,000 lots, lying within the corporation limits, were recently attached. Some of the owners of these lots, who purchased the same from Tweed, are now seeking to establish the validity of their titles. Yesterday Judge Barrett released from the *lis pendens* a lot owned by Matthew Bird, on Eighth avenue, near Seventy-first street, it being shown that he bought the same in good faith and paid its full value, and the attorney-general also consenting to its release. This is the second application of this kind that has already been granted, and the likelihood is that plenty more of the same sort will speedily follow.—[*New York Herald*.